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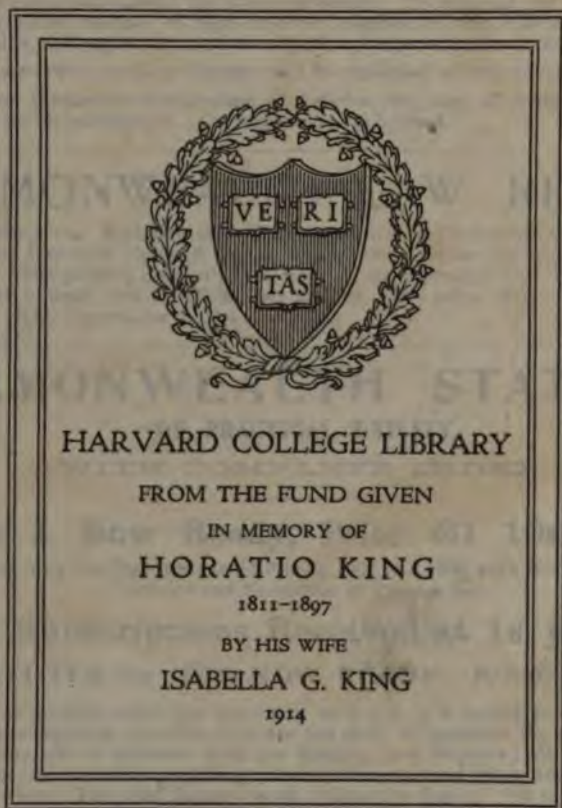
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THE JUDICIAL POWER OF THE
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THE JUDICIAL POWER OF THE COMMONWEALTH

WITH THE

PRACTICE AND PROCEDURE OF THE HIGH COURT

BY

SIR JOHN QUICK, LL.D.,

BARRISTER-AT-LAW (VIC.),

AND

LITTLETON E. GROOM, M.A., LL.M.,

BARRISTER-AT-LAW (VIC., QLD.)



Melbourne :

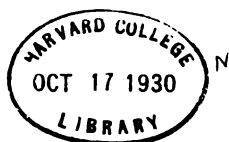
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PREFACE.

THE object of this work is to place in the hands of Students and Legal Practitioners a general survey and exposition of the judicial power of the Australian Commonwealth, coupled with a detailed analysis of the *Judiciary Act* 1903 and the *High Court Practice and Procedure Act* 1903, passed by the Federal Parliament for the purpose of bringing that power into full and effective operation ; to show, as a whole, the legal constitution and organisation of the High Court, the distribution of the judicial power among the High Court and the State Courts, and the rules regulating the practice and procedure of the High Court in the exercise of its original as well as appellate jurisdictions.

These Federal Acts have been to some extent moulded according to American models, with modifications and supplementary provisions from English and Colonial Statutes. Where sections have been taken from those sources the authors have noted the leading decisions of the Courts with respect to them.

The rules of practice and procedure for the conduct of original and appellate proceedings in the High Court are based on the latest and most approved adaptations of the English Judicature Rules, as in force in some of the Supreme Courts of the Australian States. These rules have been illustrated and exemplified by extracts from Australian practice decisions, whilst marginal notes give cross-references to the corresponding English Rules, so that the practitioner, by turning to the "Annual Practice," can at once ascertain the English authorities applicable.

The Australian practice cases have been epitomised and grouped together under the respective rules which they purport to explain and interpret. In the conduct of cases in the High Court the practice of the State Courts will often be found to be of great value and importance, seeing that in the absence of Commonwealth practice the State laws with respect to such matters are binding on the High Court.

For valuable assistance received by the authors during the preparation of this work, they desire to express their acknowledgments to Mr. R. R. Garran, C.M.G., M.A., one of the joint authors of the "Annotated Constitution of the Australian Commonwealth"; Mr. Bernard E. Wise, K.C. (N.S.W.); Mr. P. McMahon Glynn, M.A. (S.A.); Mr. Henry Dobson (Tas.); Mr. John Henry Keating (Tas.); and Mr. J. Walsh (Q.).

They desire especially to express their obligations to Mr. W. F. Wilson, M.A., and Mr. A. D. Graham, B.A., authors of the "Supreme Court Practice of Queensland," from which they have drawn the system of cross-references adopted in connection with the Rules, and to the authors of the other works referred to in this volume.

Melbourne,

1st July, 1904.

J. Q.

L. E. G.

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ADDENDA ET CORRIGENDA.

Page 30.—In line 4, read “sec. 38” for “sec. 31.”

„ 40.—In line 33, read “sec. 76” for “sec. 77.”

„ 126.—Add to note on “Any matter involving its interpretation”: For rules of interpretation of the Constitution of the Commonwealth, see *D'Emden v. Pedder*, 1 C.L.R., 91; *The Municipal Council of Sydney v. The Commonwealth*, 1 C.L.R., 208; *The State of Tasmania v. The Commonwealth and the State of Victoria*, 10 A.L.R. (C.N.), 41; 1 C.L.R.

„ 196.—Add as note to sec. 69 (3):

Facts or circumstances from which it may appear desirable in the interest of justice that an appointment of counsel should be made under this sub-section considered; *Rex v. Olive Douglas*, 25 A.L.T., 217.

„ 449.—Add to note to sec. 194:—

A new fact relied on to invalidate an election will not be allowed to be set up by amendment of the petition after the time allowed by law for presenting a petition. A petitioner will be kept strictly to the case made by the petition; *Cameron v. Fysh*, 1 C.L.R.

CHAPTER I.

THE JUDICIAL POWER OF THE COMMONWEALTH.

DEFINITION AND LIMITS.

THE first section of the chapter of the Federal Constitution of Australia relating to the Judicature, declares in words corresponding to those of a similar section in the Constitution of the United States of America that "the Judicial Power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other Federal Courts as the Parliament creates, and in such other Courts as it invests with Federal jurisdiction." Before proceeding to examine the content and nature of the judicial power, so vested, it will be conducive to clearness and exactness to consider the meaning of "the Commonwealth," as used in this chapter of the Constitution, and compare it with another sense in which it is used in earlier passages of the Imperial Act, 63 & 64 Vict., Ch. 12, constituting the Commonwealth.

The primary and most comprehensive signification of the term "Commonwealth" is to be found in the preamble and first six covering clauses of the Act, in which it is distinctly used to indicate the federal union of the Australian people and the Australian colonies into one indissoluble political partnership under the Crown. The statutory definition is given in clause 6, which declares that "The Commonwealth shall mean the Commonwealth of Australia as established under this Act." By the same clause, the former colonies of New South Wales, Queensland, Tasmania, Victoria, Western Australia and South Australia are declared to be "parts of the Commonwealth" under the name of "States."

The Commonwealth, formed by the union of the Australian people and colonies, was established by clause 3 of the Imperial Act. It came into existence independently of the Constitution detailed in clause 9. In other words, the newly organised political society is clearly distinguishable from the new system of government. The Commonwealth, as a political entity and political partnership, is outside of and supreme over the Constitution. It is outside of and supreme over the government provided by the Constitution.

The attributes and characteristics of the union, which may be gathered from the preamble and covering clauses, can be thus summarized :—It is a *quasi* national State, composed of a related people, of ethnic unity, occupying a fixed territory of geographical unity, bound together by a common Constitution, and organized by that Constitution under a dual system of provincial and central government, consisting of two sets of legislative, executive, and judicial departments, each set being operative within its own assigned sphere, and each set being subject to the common Constitution—Quick and Garran's Annot. Const., p. 368.

The essence of a federation is, that it is a community welded together and subject to a dual system of Government. Not only are the people of the pre-existing communities, provinces, or colonies united, but those communities, provinces or colonies, considered as corporate political units, are also united into one larger aggregate or whole, under one common Constitution, to which they owe allegiance, and which regulates their rights and duties. Of the dual system of government referred to, one part consists of the former separate colonial or provincial governments, to the extent to which they have not been altered by the new constitutional instrument, whilst the other part consists of the new group of governmental agencies created by the same document. Thus the legislative, executive, and judicial authorities of the former provinces or colonies continue in the exercise of the residue of powers and functions left to them undisturbed by the new régime, and a fresh set of governing instrumentalities, in the shape of a federal legislature, a federal executive, and federal judiciary appear on the scene,

charged with the exercise of powers and functions of a general or national character, having jurisdiction for limited and assigned purposes over the whole of the people in the united community. Professor Jenks thus summarises the essential features of a federal Constitution as sketched by Dicey in his "Introduction to the Study of the Constitution" :—

"(a) A written supreme constitution, in order to prevent disputes between the jurisdictions of the Federal and State authorities; (b) a distribution of powers between the Central or Federal Government and the Governments of the several States which comprise the union, and probably also among the various parts of the Federal Government; (c) a Supreme Court, charged with the duty of interpreting the Constitution and enforcing obedience to it by the organs both of the Federal and State Governments, and absolutely free from the influence of both." ("History of Politics," p. 152).

Applying these principles to the Australian Commonwealth, it is obvious that the total mass of the legislative powers of the Commonwealth, considered as a political unit, is vested partly in the several Legislatures in the Several States, and partly in the Federal Parliament; that the total mass of the executive power of the Commonwealth is vested partly in the executive governments of the several States, and partly in the federal executive, and the whole volume of the judicial power, considered from a similar standpoint, is vested partly in the Courts of the several States, and partly in the Federal Courts provided by the Constitution. These separate and distinct organs of government are kept within their respective orbits of influence and action, by the supreme mandates of the Constitution, which is founded on and capable of amendment only by the sovereign authority residing in the electoral body. So much for the wider and more national signification of the term "Commonwealth," as it is manifestly defined by the first six covering clauses of the Imperial Act.

In several sections of the Constitution, however, the term "Commonwealth" is inartistically used to denote the Central or Federal Government, as contrasted with the Governments of the States, *i.e.*, "The Legislative Power of the Commonwealth," sec. 1; "The Executive Power of the Commonwealth," sec. 61; "The Judicial Power of the Commonwealth," sec. 71. These expressions refer to the legislative, executive, and judicial powers granted by the Constitution to the various organs of the

Central or Federal Government. In the American Constitution the term "United States" is sometimes used to describe the Union, and sometimes to denote the Central or Federal Government of the Union. These are instances of the secondary use and significance of corresponding terms in both Constitutions. The secondary use and meaning of "Commonwealth" must be distinguished from its primary and proper meaning, as defined in the constructive clauses of the Imperial Act.—Pomeroy's Constitutional Law, p. 68; Quick and Garran's Annot. Const., p. 368.

The judicial power of the Commonwealth means and includes only—(1) The appellate power vested by the Constitution exclusively in the High Court; Const., sec. 73. (2) The original power vested by the Constitution in the High Court; Const., sec. 75, but which by federal legislation may be vested concurrently in other Federal Courts or in State Courts; Const., sec. 77. (3) The additional original power, not vested by the Constitution, but which may by federal legislation be conferred either on the High Court or on any other Federal Court or any State Court; Const., secs. 76, 77. This definition necessarily excludes the judicial power previously vested in the Courts of the States by State Constitutions and State laws.

One other remark of a general character may appropriately be made before proceeding to review the organization and constitution of the High Court, and the nature and extent of the federal judicial power.

The judicial power is the power belonging to one of the three great departments of government. Supreme governing power, analyzed and classified, may be resolved into three departments or divisions—(1) The making and promulgating of laws, prescribing the functions of governing agencies and regulating the legal rights and duties of the people within the jurisdiction of the government. (2) The administration of laws. (3) The interpretation, determination, and application of laws in specific cases.

In simple societies these three functions may be blended together in one person or in one body, but in maturely developed States they become differentiated and divided, among separate

persons or bodies composing or representing the sovereign authority as a whole. Hence arises the well-known tripartite division of government into the legislative department, the executive department, and the judiciary department. All constitutions which have been reduced to and expressed in the shape of written instruments recognize this principle of division and distribution of power. The same distribution is observed in the British system of government, although the British Constitution has not been reduced to the form of a single document or Act of Parliament—Quick and Garran's Annot. Const., p. 315.

This tripartite classification does not necessarily imply that each of the three departments of government is independent of the others. Each is endowed with a defined share in the work of the government, but they are all parts of one governing machine, and exercise fractions of the aggregate of sovereign power; each acts within its respective legal sphere, but to some extent one may check and balance the other. Thus the legislature may exercise more or less control over the executive. The executive may advise, lead, or for a time moderate the action of the legislature, as is done in the British system, through the agency of the Cabinet, and by the power of dissolution. In every well designed Constitution, the judiciary, once appointed, is almost absolutely independent of the influence of either the executive or the legislature, but the primary appointment of the judges generally rests with the executive, and for gross misconduct in office they may be removed by the executive. In some Constitutions they may be removed by the executive at the request of the legislature. In every known political system the legislature fixes and appropriates the salaries of the judges.

In accordance with these fundamental principles the Constitution of the Commonwealth has vested the legislative, executive and judicial powers, granted by the Constitution to the Central or Federal branch of the dual system of government, in separate and distinct organs. Chapter I. vests the legislative authority in the Federal Parliament. Chapter II. vests the executive authority in the Queen and her heirs and successors in the sovereignty of the United Kingdom, and it is exerciseable by

the Governor-General as the representative of the Crown. Chapter III. vests the judicial power in the Federal Courts.

Judicial power is the power conferred on the Courts strictly so called ; Courts that compose one of the three great departments of government, and not power judicial or *quasi*-judicial which is sometimes invested in individuals either separately or collectively for a particular purpose, and during a limited time—Miller's Const. of U.S., p. 313 (n.). It is never exercised for the purpose of giving effect to the will of the judge, but always to give effect to the will of the legislature, or in other words, the will of the law. *Osborn v. The Bank of the U.S.*, 9 Wheat., 738.

The distinction between judicial and political power is now generally acknowledged in the jurisprudence of both England and America. *Nabob of Carnatic v. East India Co.*, 1 Vesey jr., 371 ; *Penn v. Lord Baltimore*, 1 Vesey, sen., 444 ; *New York v. Connecticut*, 4 Dall., p. 6. It has long been settled that the interpretation of laws belongs exclusively to the judiciary—Sedgwick on Const. Law, p. 18.

In the early ages of the English system the boundary line between the judiciary and the legislature was not distinctly marked, and Parliament, consisting of one great Chamber, in which sat both lords and commoners, not only made the law but interpreted it. Even after the separation into two Houses the House of Lords became the Superior Court of Appeal, and Parliament was in the habit of passing Bills of Attainder as well as enacting convictions for treason and other crimes. The House of Lords still has power to entertain proceedings, known as impeachments, for the prosecution of high officers of State at the instance of the House of Commons—Sedgwick, Const. Law, 18.

The House of Lords when sitting in its judicial capacity may still submit to the Judges questions bearing on any case *sub judice*, and even when sitting in its legislative capacity it has the constitutional right to propound abstract questions of law for the opinion of the Judges—Broom's Const. Law, p. 147. The Judges will, however, decline to answer a question put by the House of Lords unless it is confined to the strict legal construction of existing laws. In *Re the London and Westminster Bank*, 2 Cl. & F., 191, the Judges declined to

answer a question submitted to them by the House of Lords, as to whether the provisions of a certain bill then before the House were consistent with the statutory rights of the Bank of England.

By the Constitution of the United States there is a strict separation of the judicial from the other departments of Government, and it has been held that the President is not entitled to the advice and opinion of the Supreme Court on legal or constitutional questions. The Court can be called upon only to decide controversies brought before it in a legal form, and it is bound to abstain from the expression of extra-judicial opinions upon points of law, even though solemnly requested by the Executive—Story's Comm., § 1571; Bryce's Amer. Comm., 1st ed., vol. i., p. 351.

In Canada the Governor-in-Council is authorized by Statute 54 & 55 Vic. c. 23, sec. 4, to refer to the Supreme Court for hearing any important questions of law or fact respecting provincial legislation, or touching the constitutionality of any legislation of the Parliament of Canada, or touching any other matter which it sees fit to refer. Persons interested are entitled to be notified and to be heard by counsel. The Judges are required to give reasons for their opinions, which are advisory only, though they are appealable to the Privy Council—Wheeler's Confd. of Canada, p. 405.

Under the Constitution of the Commonwealth, as under that of the United States, the functions of the federal Justices are strictly and exclusively judicial, and no duties can be cast upon them of an essentially extra-judicial kind. They cannot be called upon to advise on questions of a political nature, or as to the constitutionality of proposed legislation. But whether they could be called upon by the Parliament or by the executive acting under a law of the Parliament to deliver opinions on the "strict legal construction of existing laws," is a more difficult question. The answer seems to depend on the scope and meaning of the word "judicial." Would such opinions be judicial or extra-judicial? The true answer would seem to be that the function of advising on a matter of law, where there is no regular judicial proceeding before the Court to declare the

rights of parties, or to enforce remedies, is no part of the duty of a Judge, and is not contemplated in the gift of the judicial power. In England, the advisory duties of the Judges were very exceptional, and only exercised, by virtue of ancient custom, at the request of the House of Lords—itself a judicial as well as a legislative body. In the Australian colonies no such practice is known; whilst the advisory duties which are cast upon the Canadian Judges by statute are clearly extra-judicial. The giving of advisory opinions is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority.—Professor J. B. Thayer, article on the Origin and Scope of the American Doctrine of Constitutional Law, 7 *Harvard L. Rev.*, 129, 153; cited *Kent's Comm. I.*, 296; *Quick and Garran's Annot. Const.*, p. 767; *Miller's Const. U.S.*, p. 314.

THE JUDICIAL POWER BEFORE THE ORGANIZATION OF THE HIGH COURT.

The High Court of Australia is apparently created by the Constitution, by which the minimum number of its judges, their mode of appointment, their tenure of office, the whole of its possible appellate and part of its original jurisdiction was determined. The High Court, however, was not called into action, but so to speak, remained dormant until the Federal Parliament passed the *Judiciary Act* 1903, by which provision was made for the qualification, number, remuneration, and appointment of judges, and for the appointment of officers necessary to perform ministerial duties in connection with the Court. Another Federal Act providing for the procedure and practice of the Court was also passed.

But although the High Court was not organized until the passing of the *Judiciary Act* 1903, the whole of the judicial power of the Commonwealth did not remain dormant and inactive; otherwise the duties and functions of Government would have been to a large extent rendered impossible.

In the first session of Parliament Acts were passed organizing the Department of Customs and the Post and Telegraph Department, creating rights, imposing duties, and declaring certain acts

or omissions to be offences, punishable by fine or imprisonment, In the absence of a legally equipped High Court or other federal Court, Parliament vested in the several Courts of the States jurisdiction to deal with cases arising under these laws.

By the *Customs Act* 1901, sec. 245, it was provided that proceedings for the recovery of penalties under the Act or for the condemnation of ships or goods seized as forfeited could be instituted either (a) in the High Court of Australia when organized; (b) in the Supreme Court of any State; or (c) when the prosecution was for a pecuniary penalty not exceeding £500, in any State County Court, District Court, Local Court or Court of summary jurisdiction. The *Post and Telegraph Act*, sec. 151, declared that offences against that Act, or the regulations passed thereunder, not being indictable offences, were punishable upon summary conviction by a Police, Stipendiary or Special Magistrate. The Act was silent respecting the prosecution of indictable offences. It was not until the passing of the *Punishment of Offences Act* 1901 that complete but temporary provision was made for the punishment of offences against the laws of the Commonwealth. By that Act the several Courts and Magistrates of each State exercising jurisdiction with respect to the summary conviction, or examination and commitment for trial, or trial upon indictment or information, of offenders against the laws of the State, "shall have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth committed within that State, or who may lawfully be tried within that State for offences committed elsewhere."

The *Claims Against the Commonwealth Act* 1902 completed the preliminary arrangements made by Parliament for the partial exercise of the judicial power of the Commonwealth, by enabling any person having claims in contract or in tort against the Commonwealth to bring an action or suit against a nominal defendant to be appointed by the Federal Government in the Supreme Court of the State in which the claim arose. Before the passing of this Act it was decided by Pring, J., that the Supreme Court of New South Wales had no jurisdiction in an action by a person claiming damages for negligence against the Postmaster-General; *Hunnah v. Drake*, 1902, N.S.W. S.R.; 1902, 8 A.L.R. C.N. 69.

The question has since been raised as to the constitutionality of those laws, vesting judicial power in the Courts of the States, prior to the legal organization of the High Court. It has been suggested that inasmuch as the Constitution declares that "the judicial power shall be vested in a Federal Supreme Court, and in such other Federal Courts as the Parliament creates, and in such other Courts as it invests with federal jurisdiction," these words imply a sequence and order in the exercise of legislative authority, and that the Parliament, therefore, could not invest the State Courts with federal jurisdiction before it took steps to vest judicial power in the High Court. It was contended that the Constitution contains a mandate that the judicial power "shall be vested in the High Court" in the first instance, and that consequently it could not be vested first in the State Courts or in any Federal inferior Court; that any grant of judicial power to the State Courts before the organization of the High Court would be null and void.

"You cannot, consistently with the spirit of the Constitution, have the exercise of the Commonwealth judicial power in the absence of a High Court. But you can have the exercise of that judicial power either in the Federal Supreme Court alone, or in association with any other Federal Courts of inferior degree that Parliament chooses to create, or in association with State Courts which it may invest with jurisdiction, or with both these inferior tribunals together. You cannot properly, however, carry on business in the absence of what I may be permitted to call the predominant partner: you are not to have the judicial power vested in either or both classes of inferior Courts in the absence of the Federal Supreme Court. . . . Unless we have a Federal Supreme Court we have not the means of exercising judicial power, as I conceive the Constitution intended, or the means of exercising, without doubt, the judicial power of the Commonwealth in federal jurisdiction. We have passed Acts of Parliament, we have moved under them, and this question has not been raised. But I believe that if it is raised, and if the Courts are guided by what has been decided in the Supreme Court of the United States, it may be that if we do not institute a High Court in some form to accord with section 71 of the Constitution, we shall incur a risk which may cost the Commonwealth a great deal more than any of the sums which have been mentioned during this debate."—The Hon. I. A. Isaacs, *Parliamentary Debates*, 1903, pp. 721 and 724.

These arguments, if sustained, would involve serious and far-reaching consequences. It would mean that the grant of federal jurisdiction to the State Courts by the *Customs Act*, the *Post and Telegraph Act*, the *Punishment of Offences Act*, and the *Claims Against the Commonwealth Act*, was unconstitutional,

and that all the decisions, convictions, forfeitures, and awards made by the State Courts were absolutely illegal and of no effect; that all the costs and fines paid thereunder would have to be refunded, and compensation given for false imprisonment where offenders had been sent to gaol. The whole argument in this direction appears to have been elaborated for the purpose of proving that the Constitution imposed a mandate on the Parliament to vest the judicial power in the High Court by organizing it and calling into existence. Reliance was placed on the decision of the Supreme Court of the United States in the case of *Martin v. Hunter*, 1 Wheaton, p. 328, in which Mr. Justice Story stated that similar words in the American Constitution were manifestly designed to be mandatory upon the Federal Legislature. A passage from Kent's Commentaries, I., 292, was also relied on. It may be pointed out, however, that the Constitution of the United States contains no provision similar to that of the Australian Constitution, authorizing the Federal Legislature to invest State Courts with federal jurisdiction, and consequently if the Supreme Court or some inferior Federal Court had not been organized by Congress to exercise the judicial power, the executive Government of the United States would have been paralyzed, and the Constitution itself would have broken down and collapsed, for want of some judicial authority to interpret and apply it, as well as the laws passed under it.

In the case of the Constitution of the Commonwealth the contention now under consideration might reasonably be met with the argument that the opening words of section 71 "the judicial power . . . shall be vested in a Federal Supreme Court" mean that such power is, upon the establishment of the Commonwealth, and thenceforth vested in the High Court by the operation of the Constitution itself, and not by any Act of the Federal Parliament. By the words of the Constitution the High Court has been endowed with Appellate Jurisdiction (sec. 73), and a certain amount of Original Jurisdiction (sec. 75). Parliament can only confer on the High Court the additional original jurisdiction defined in sec. 76. The organization and constitution of the High Court by appointment of judges marks the beginning of its performance of judicial duties, but it existed as a corporate entity

and institution, within the Constitution, before the passing of the *Judiciary Act* 1903. That Act does not pretend to vest the judicial power in the High Court except to the extent of conferring upon it a portion of the additional original jurisdiction contemplated by sec. 76, referring to "matters arising under the Constitution, or involving its interpretation."

The argument against the validity of Federal Acts conferring federal jurisdiction on State Courts before the passing of the *Judiciary Act* 1903 is based on the assumption that before Parliament could legally pass those laws it ought to have passed another law vesting the judicial power in the High Court, but a careful examination and consideration of the language of sec. 71 justifies the view that the Constitution vests the whole of the appellate power and a considerable portion of the original power in the High Court, and all that the Federal Parliament could do or has done was to determine its personnel, strength, and composition, and to render the free exercise of its constitutional functions possible. The words of the section giving Parliament authority to create "other Federal Courts," and to invest State Courts with federal jurisdiction, present a remarkable contrast to the words of the Constitution creating the High Court. In the case of "other Federal Courts," Parliament not only is authorized to establish them, but to determine their jurisdiction. With reference to State Courts, Parliament found them pre-existing and invested them with federal jurisdiction, having no voice in their composition or establishment. In the case of the High Court, Parliament found it established by the Constitution with the bulk of its functions pre-determined; the only duty which Parliament had to perform being to provide for the number, appointment, and remuneration of the judges.

In conformity with the principles affirmed in the American cases it may be contended that it was the imperative duty of Parliament to make some provision adequate to public requirements for the exercise of the judicial power in order to prevent a breakdown of the federal system; that this duty was performed by the passing of laws investing State Courts with federal jurisdiction; that at the earliest opportunity consistent with the state of parliamentary business Parliament passed a law enabling the High Court to be organized; that the judicial power is divisible,

and that one instalment of it might legally be granted to the State Courts antecedently to the coming into action of the High Court; that there is nothing in the Constitution forbidding Parliament to exercise its discretion as to the order in which it should perform the work assigned to it of organizing the judicial department. A further argument would be that, although it may be the mandatory duty of Parliament to provide for the appointment of judges of the High Court, the Constitution does not expressly or impliedly impose the penalty of nullity on Acts passed by it in the exercise of its discretionary power to vest jurisdiction in State Courts before it performed its mandatory duty.

It seems clear that the judicial power is not an indivisible quantum or mass, but that it is capable of division and classification under separate groups or headings, some being distributed by the Constitution, and some being left to be allocated by the Parliament. The appellate jurisdiction is obviously severable and distinguishable from the original jurisdiction. Subject to exceptions and limitations which could be imposed by Parliament, the whole of the appellate jurisdiction is, by the Constitution, vested in the High Court. The whole of the original jurisdiction is not by the Constitution assigned to the High Court, but only a portion of it, the residue being left to Parliament to confer on either the High Court or inferior Federal Courts or State Courts. Thus Parliament was not bound to confer on the High Court original jurisdiction in the additional matters detailed in sec. 76. It could withhold it, and, as a matter of fact, it has withheld from the High Court all the additional original jurisdiction except a particular and limited class of cases arising under the Constitution or involving its interpretation. It is, therefore, not only conceivable, but highly probable, that Parliament could proceed to exercise the power granted to it by sec. 77 (iii.) of the Constitution to give the State Courts power to deal with cases arising under the Customs and Postal Acts before prescribing the number of judges of the High Court under sec. 71, and before fixing their remuneration under sec. 72 (iii.).

Hence when the Constitution declares that "the judicial power shall be vested in the High Court and in such other Federal Courts as the Parliament creates, and in such State

Courts as it invests with federal jurisdiction," it is reasonable to conclude that the enactment may be read in the distributive sense which may be gathered from the actual disposition of power made by the Constitution itself and the potential disposition of power which the Constitution has entrusted to Parliament, and that no cumulative order, or sequence of disposition was intended.

ORGANIZATION OF THE HIGH COURT.

By the *Judiciary Act* 1903, the High Court is declared to be a superior Court of record to consist of a Chief Justice and two other Justices. The Chief Justice receives £3,500 and the Puisne Justices £3,000 per year. A Justice of the High Court is not permitted to hold any other office or place of profit within the Commonwealth, except any such judicial office as may be conferred upon him by or under any law of the Commonwealth.

The mode of appointment and tenure of office of Justices of the High Court is determined by the Constitution and not by the Parliament. Once their number and their salary have been fixed by the Parliament they are appointed by the Governor-General in Council, and they cannot be removed except by the Governor-General in Council, on an address from both Houses in the same session praying for such removal on the ground of proved misbehaviour or incapacity; Constitution, sec. 72. They receive such remuneration as the Parliament may fix, but although it may be increased it cannot be reduced during their tenure of office. Their tenure of office is thus placed on a basis even more secure than the Judges of the High Court of England. The Parliament of the United Kingdom could pass a law abolishing the good behaviour tenure of those Judges as determined by the Act of Settlement, 12 & 13 Wm. III., chapter 2, and subsequent legislation; but the Federal Parliament could not repeal sec. 72 of the Constitution of the Commonwealth. That could only be done by an amendment of the Constitution, which would require the approval not only of both Houses of the Parliament but of a majority of the electors voting in a majority of the States; Const., sec. 128.

Still, when we come to consider the matter more closely, it will be seen that the initial organization, as well as the continued existence of the High Court, depends to a large extent on the will of the Federal Legislature. At the end of the term of any Judgeship concluded by death, resignation, or removal, it could reduce the salary of the office so low as to practically make it untenable.—Burgess, Const. Law II., p. 321.

The principal seat of the High Court will be the seat of the Federal Government when that seat is established by law ; Const., sec. 125 ; and until the federal capital is fixed the principal seat of the Court will be at such place as the Governor-General in Council may from time to time appoint. At the principal seat of the High Court there is to be a Principal Registry presided over by a Principal Registrar, who will have power to administer oaths and to perform such duties in respect to proceedings pending in the Court as are assigned to him by rules of Court or by any special order of the Court.

In the capital of each State there is to be a District Registry, and District Registries may be established in other places in any State or territory on the recommendation of the High Court. At every District Registry there is to be a District Registrar, and such other officers as may be necessary to administer oaths, and to perform such duties as may be assigned to them by rules or special order of the Court. At the principal seat of the High Court there is to be an officer called the Marshal, corresponding to a Sheriff, who is charged with the service and execution of writs, summonses, orders, warrants and commands of the Courts. The process of the High Court runs, and the judgments and orders of the High Court have effect, and may be executed throughout the Commonwealth irrespective of State boundaries. In and for each State in which there is a District Registry there is to be a Deputy Marshal whose duty will be, when directed by the Court, to execute and perform within the State all such acts as the Marshal would be bound to perform if he were personally present and acting in that State.

Any person entitled to practice as a barrister or solicitor, or both barrister and solicitor, in any State has the like right to

practice as a barrister or solicitor, or both barrister and solicitor, in the High Court and in every other Federal Court.

Although the Constitution provides that the High Court, as an institution of government, shall consist of not less than three justices, it does not say that its jurisdiction, either appellate or original, must be exercised by not less than the minimum number of judges. It is left to the Parliament to prescribe the number of judges required to exercise any particular part of its judicial power—Const., sec. 79. The *Judiciary Act* has, accordingly, defined the number of judges who may or must participate in what may be described as the exercise of the various grades of judicial power. It has decided that the jurisdiction of the High Court may be exercised either by a single justice or by a Full Court which may consist of two or more justices—*Judiciary Act*, secs. 15, 19. In their ascending order these grades may be classified as follows:—

- CHAMBER BUSINESS.—In matters within the original jurisdiction a single judge of the High Court sitting in Chambers can dispose of that class of business preliminary or incidental to an action, suit or proceeding, known as Chamber business, including applications relating to the conduct of a cause, to the custody, management, preservation, or sale of property in dispute in an action, to directions as to matters prescribed by Act or rule of Court. A single judge in Chambers may reserve or state a case or question for the consideration of the Full Court.

AS A PRIMARY COURT.—Any justice of the High Court sitting alone in Court may exercise the original jurisdiction conferred on the High Court either by the Constitution or by federal legislation. In this capacity it would be a Primary Court or Court of First Instance. In such Court the presiding justice can, after hearing any cause or matter, pronounce judgment subject to the right of appeal to the Full Court, or he can give further hearing or consideration to the cause or matter at another sitting of the Court in another place, or he may state a case or reserve any question for the consideration of the Full Court.

AS A COURT OF APPEAL.—Sitting as a Court of Appeal to hear and determine appeals in federal cases from Courts or judges exercising federal jurisdiction, a quorum of the High Court must

consist of two or more justices. Sitting as a Court of Appeal to hear and determine appeals from the Supreme Court in Banco of any State in federal as well as in State law cases, the appellate jurisdiction of the High Court must be exercised by a Full Court consisting of not less than three justices. When the justices sitting in a Full Court are divided in opinion as to the decision to be given on any question it must be decided according to the decision of the majority, if there is a majority, and if the Court is equally divided in opinion the opinion of the Chief Justice, or, in his absence, that of the senior justice present prevails. But upon an appeal from a decision of a justice of the High Court or a judge of the Supreme Court of a State exercising federal jurisdiction, if the Court be equally divided in opinion the decision appealed from must be affirmed unless the justice or judge whose decision is appealed from reports to the Court that he desires that the matter shall be determined without reference to the fact that he has pronounced the decision ; if he so reports the opinion of the Chief Justice or senior justice present prevails where the Court is equally divided in an opinion.

Applications to the High Court under sec. 74 of the Constitution for a certificate that a constitutional case decided by the High Court is one which ought to be determined by the King in Council, must be dealt with by a Full Court consisting of not less than three justices.

THE JUDICIAL POWER IN THE AGGREGATE.

It is essential to preserve a clear distinction between the judicial power of the Commonwealth in the aggregate and the jurisdiction which the Constitution has directly conferred or authorized Parliament to confer on Courts to exercise it. The Constitution has expressly defined the nature, character, and extent of the judicial power. Within certain limits Parliament is authorized to legislate, regulating its distribution amongst several classes of Courts and its mode of exercise by those Courts.

Whilst Parliament cannot add to or take from the Judicial Power granted by the Constitution, it can, under the Constitution,

sec. 51—XXXIX., pass “laws necessary and incidental to the execution of the Judicial Power.” No mention is made in the Constitution of the right of litigants, and other persons interested in proceedings in the Federal Courts, to appear and be heard by counsel learned in the law; but the grant of ancillary power covered by this sub-section enables the Parliament to legislate, or to authorize the High Court to make rules, respecting the legal profession, its qualifications, privileges, and obligations in relation to Federal Courts. It also authorizes the appointment of proper officers to preserve the records and enforce the judgments, decrees, orders and sentences of the Federal Courts.—Quick and Garran’s Annot. Const., 651, 655. The Constitution expressly provides that trials on indictments shall be by jury, but there is no obligation to try civil cases by jury. “It is submitted that the power given by section 51—xxxix., to make laws with respect to matters incidental to the execution of any power vested by this Constitution . . . in the Federal Judicature, includes the power to provide for trial of issues of fact by jury in any federal court in all cases in which the Federal Parliament shall think it expedient to do so. The trial of civil issues by juries is such an ancient and established institution of English law, that it may well be deemed not only incidental, but even necessary, to the due administration of justice according to English ideas.”—Quick and Garran’s Annot. Const., p. 727. See *High Court Procedure Act 1903*, secs. 12, 13.

The Constitution recognizes the judicial power as capable of various classifications and lines of divisions, and it will be convenient to consider it from those several constitutional stand-points. They may be placed in juxtaposition thus:—

1. Original Power :
2. Appellate Power :
3. Concurrent Power :
4. Exclusive Power :
5. Civil and Criminal Power.

ORIGINAL POWER.—Original Judicial Power is the power exercised in hearing and determining, in the first instance, or from the beginning, a legal controversy between parties ; it is the

power to construe laws and determine issues of fact and decide questions of law subject to the Appellate Jurisdiction. Under the Constitution of the Commonwealth it includes the power to deal with all matters coming within the meaning of the grants specified in sections 75 and 76. It also includes all power necessary and incidental to the execution of the Judicial Office, such as the issue of extraordinary writs by the High Court to Courts of inferior jurisdiction which Parliament under the Constitution, sec. 51—xxxix., may confer, as to which see *Judiciary Act*, sec. 33. In some of the cases within the Original Power the High Court will have to ascertain and apply Federal laws, and in other cases such as disputes between residents of several States it will have to interpret and apply State laws.—Jud. Act, sec. 79.

APPELLATE POWER.—The appellate branch of the Judicial Power of the Commonwealth is specified in the Constitution, secs. 73, 74. It is the power to review and revise the judgments, decrees, orders, and sentences of judicial tribunals. As a Court of Appeal in State law cases the High Court will determine the laws of the States in which the cases respectively arise. It may be statute law or the common law so far as it remains operative therein. As a Court of Appeal in federal matters, it will ascertain and apply the law of the Constitution and Federal laws enacted thereunder. As to the manner in which the common law is applicable to federal cases, see *Judiciary Act*, sec. 80.

CONCURRENT POWER.—These are Judicial Powers which may be exercised concurrently—that is at one and the same time—by the High Court, by inferior Federal Courts, and by State Courts invested with Federal jurisdiction. The Constitution, sec. 75, provides that the High Court shall have jurisdiction in all matters arising under any treaty, or affecting consuls, or to which the Commonwealth is a party, or to which a State is a party, &c., but by sec. 77, Parliament is authorized to give other Federal Courts as well as State Courts concurrent jurisdiction in the same matters. Additional original jurisdiction dealing with cases arising under the Constitution, or under the laws passed by the Parliament may, by sec. 76, be conferred by Parliament on the High Court or any other Federal Court, or on State Courts—sec. 77. In the exercise of its discretion Parliament has granted to

the High Court only a portion of this additional original jurisdiction, the rest of which therefore is exclusively vested in the State Courts at least for the present—Jud. Act, sec. 39. Parliament can invest State Courts with Original Jurisdiction in Federal matters as wide as that of which the High Court can be clothed—sec. 77 (iii.) In cases involving the construction and application of State laws decided by the Supreme Courts of States there is, subject to certain exceptions and conditions, a concurrent right of appeal to the High Court and to the Privy Council.

EXCLUSIVE POWERS.—These are Judicial Powers which can be exercised only and exclusively by certain Courts and which other Courts have no jurisdiction to entertain. One of the most important examples of this exclusive Judicial Power to be found in the Constitution is the power vested in the High Court to hear appeals from Federal Courts, and from Courts exercising federal jurisdiction, and from the Inter-State Commission. Parliament can define the subjects in which and the extent to which the jurisdiction of any Federal Court may be exclusive of that which belongs to or is vested in the Courts of the States; this it has done in the *Judiciary Act*, secs. 38, 39.

CIVIL AND CRIMINAL POWERS.—Under another cross division the Judicial Power may be considered from its civil and criminal aspect. It was absolutely essential that the Constitution should authorize the organization, creation, and investment of Courts of civil and criminal jurisdiction; the one set to protect and enforce civil rights established by federal laws and the other for the punishment of offences against such laws. All these requirements are covered by the Constitution and by the authority it has conferred on the Federal Parliament. A case arising under the Constitution and laws of the Commonwealth may as well arise in a criminal prosecution as in a civil suit: per Strong, J., in *Tennessee v. Davis*, 100 U.S., p. 266. There are in the Constitution several express prohibitions, the violation of any of which would constitute a criminal or quasi-criminal act, such as that no person shall vote more than once at a Federal election, and that no disqualified person shall sit in Parliament. Federal legislation has also created a large number of offences, and annexed penalties to them. The High

Court has not been authorized by the *Judiciary Act* to exercise original jurisdiction in cases of offences arising under the Constitution, or under laws made by Parliament. The State Courts are exclusively authorized to deal with and punish offenders against Federal laws. But, although, the High Court has no original jurisdiction it can (A) grant special leave to appeal against any judgment of the Supreme Court of a State in any criminal matter arising under Federal or State laws—*Judiciary Act*, sec. 35 (b); and (B) it can grant special leave to appeal from any decision of any court or judge of a State given in the exercise of Federal jurisdiction.—*Jud. Act*, sec. 39 (2) (c).

THE ORIGINAL JUDICIAL POWER.

If we analyse and classify the several grants of Original Power, within the Constitution, most of them being copied from similar grants in the Constitution of the United States, we will find that they are all capable of being placed under one of two heads or descriptions, viz. :—(1) Power based on the subject matter of an action, as being properly within the scope, and absolutely necessary to the intrinsic supremacy of the national government and the stability of the Constitution, and without which the union would be a mere name; and (2) power based exclusively on the character or status of the parties to an action, these latter powers being justified on grounds of expediency rather than by inherent necessity.—Pomeroy's *Const. Law*, p. 625.

SUBJECT MATTER OF THE ACTION.—The original Judicial Power based on the subject matter includes cases arising under any treaty, under the Constitution or involving its interpretation; or arising under any law made by Parliament, Admiralty and Maritime matters, and disputes relating to property claimed under the laws of different States. It was indispensable that there should be a federal department invested with judicial authority commensurate with the Legislative department and consistent with the supreme representative character of the Federal Government. This attribute of supremacy would be destroyed by permitting the State Courts to exercise uncontrolled power to interpret and apply Federal laws; it would be

destroyed by making their decisions in the particular State, where given, of an authority equal to decisions pronounced on the same subjects by the Federal Courts. This danger could only be avoided by one of two ways, either by placing federal laws outside or beyond the purview of State Courts and conferring jurisdiction to deal with them in Federal Courts only; or by permitting the State Courts to exercise concurrent, but subordinate jurisdiction, in such cases and rendering the decisions reviewable by the Federal Supreme Court, so that they might be harmonized and the laws of the Commonwealth given a uniform interpretation.—Pomeroy's Const. Law, p. 621. The latter course has, by the combined operation of the Constitution and the *Judiciary Act*, been adopted.

“Cases arising under any treaty” have been placed within the original cognizance of the Federal Courts, because the Commonwealth Parliament has power to make laws with respect to external affairs. It is only fitting therefore that its Courts should be able to decide disputes, it may be, between foreigners and residents of the Commonwealth, in which the interpretation of a treaty made by the Imperial Government would be involved. It may be contended that treaties are compacts made by and obligatory on the whole Empire, and their operation ought not to be affected or regulated by local laws or by the Courts of inferior jurisdiction. Private rights of property are often dependent on the stipulation of treaties. This power was formerly exercised by the State Courts, but now it is withdrawn from those Courts, and ranks with several matters in which the High Court has exclusive jurisdiction. “Cases arising under the Constitution, or involving its interpretation,” have as a matter of course been included in the original Judicial Power. The theory, as well as the practice of the Federal system demanded that some judicial authority co-ordinate with and not inferior to the legislative authority should be charged with the important functions of final arbiter in interpreting the Constitution and applying Federal laws. An illustration of a case arising under the Constitution would be where a person asserts and claims a right as flowing from an act of the Federal Parliament, and when such right is denied by another person on the ground that the act is not authorized by the Federal Constitution. Another illustration

would be where a person asserts and claims a right as flowing from an act of a State Legislature, and another person denies the existence of such a right on the ground that the State act is forbidden by the Federal Constitution. If from the question at issue it appears that some title, right, privilege, or immunity, on which the recovery depends, would be defeated by one construction of the Constitution, or of a law of the Commonwealth, or sustained by the opposite construction, the case will be one arising under the Constitution or the laws made by the Parliament—*per* Waite, C.J., in *Starin v. New York*, 115 U.S., p. 257. A case consists of a right of one party as well as the other, and it may truly be said to arise under the Constitution or under a law passed by the Parliament whenever correct decisions depend upon either.—*per* Strong, J., in *Tennessee v. Davis*, 100 U.S., p. 264.

Controversies “arising under laws passed by the Federal Parliament” come within the Original Judicial Power. These cases are such as grow out of Federal laws whenever such laws constitute the right, privilege, claim, protection, or defence of the party in whole or in part by whom they are asserted.—*per* Strong, J., *id.*

In all these cases the constitutionality of the Federal laws may be drawn into question, but in most of them the laws would be assumed to be valid and their construction only will be in issue. It may be necessary only to ascertain the rights of the parties under such laws or to determine the legality of the acts of Ministerial officers such as those of officers of Customs in the enforcement of revenue laws.

“Matters of Admiralty and Maritime Jurisdiction” do not necessarily involve the interpretation or application of Federal laws, but they are brought within the range of the Original Judicial Power because they are cognate to the legislative control by the Federal Parliament of trade and commerce within the Commonwealth and with other countries and over navigation and shipping—Const., secs. 51-i, 98. Besides as the seas are the joint property of nations whose rights and privileges relative thereto are regulated by the law of nations and treaties such cases necessarily belong to the national jurisdiction.—*per* Jay, C.J., in *Chisholm v. Georgia*, 2 Dall., p. 475.

The original Judicial Power extends also to cases in which the subject matter is claimed under the laws of different States. Thus there will be federal jurisdiction in a case where a party claims land under a grant from one State and another party claims the same land under a grant from another State. Seeing that the rights of the two States to confer the title are drawn in question it is conceived that the Courts of neither of the two States ought to decide the controversy.

CHARACTER OF THE PARTIES.—The residue of the original Judicial Power is founded on, and justified by the personality or peculiar status of the parties to legal proceedings. The Constitution gives the Federal Courts jurisdiction in matters affecting consuls or other representatives of other countries; matters in which the Commonwealth is a party; matters between States; matters between residents of different States; matters between a State and a resident of another State; matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. In all these cases the dispute may not necessarily involve the consideration of federal laws; the question to be decided may belong to the domain of common law or State statute law; for example the claim brought by a resident of one State against a resident of another State may be one for libel or slander. The jurisdiction is given because of some special circumstances or peculiar status or official character affecting the litigant or litigants and distinguishing him or them or distinguishing it or them from the community, rendering it expedient that the Federal Court should deal with such classes of cases. Most of these matters have been, by the *Judiciary Act*, sec. 38, invested exclusively in the High Court; only two of them, viz., matters relating to consuls and disputes between residents of different States, may be decided by the High Court concurrently with State Courts.

Federal Courts have Original Judicial Power in all matters affecting consuls or representatives of other countries. This jurisdiction arises whether the case turns on the application of State laws or Federal laws. Consuls are commercial officers of foreign nations whom the Commonwealth is bound to protect and treat according to the law of nations; consequently cases affecting

them ought to be cognizable by the national judicial authority—*Chisholm v. Georgia*, 2 Dall., 419. Controversies in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party are within the Original Judicial Power which applies whether the cause of action is one under State laws or one under Federal laws. Under this grant the Commonwealth could sue in a Federal Court without any further Federal legislation, but to enable it to be sued as a defendant the Constitution, sec. 78, empowers Parliament to pass laws conferring rights to proceed against the Commonwealth in respect of matters within the limits of the judicial power. This right has been conferred by the *Judiciary Act*, sec. 56 *et seq.*

Under the pre-federal system one colony could not sue another. There was no Court of jurisdiction competent to entertain such suits. By the Constitution, sec. 78, and the *Judiciary Act*, sec. 59, one State can bring a suit against another in the High Court in respect of matters within the limits of the Judicial Power. Disputes between States respecting boundaries could be determined in such a suit, but this jurisdiction, as in other matters in which jurisdiction is based on the character of the parties, must be exercised according to the pre-existing law applicable to the case whether it be State laws, or Federal laws; jurisdiction only is given by this form of grant, which makes no alteration in the law as it originally stood. Controversies between two or more States come within the Federal Judicial Power, because domestic tranquillity requires that the contentions of States should be peaceably terminated by a common judiciary, and because in a free country justice ought not to depend on the will of or be administered by the agents of either of the litigants—*Chisholm v. Georgia*, 2 Dall., 475. Similarly, cases between a State and residents of another State come within the Federal Judicial authority, because in case a State (that is, all the citizens of it), has demands against some citizens of another State, it is better that they should prosecute their demands in a national Court than in a Court of the State to which those citizens belong; the danger of irritation arising from suspicion of partiality being thereby obviated—*Chisholm v. Georgia*, *id.*, *supra*.

One of the most extensive grants of original jurisdiction grounded on the character of the parties to the action is that of

“between residents of different States.” This, like other parts of the Constitution, sec. 75, was adopted from the Judicial Power of the United States, with the substitution of the word “resident” for “citizen.” The reasons for the jurisdiction being given in the United States are explained by Story, *Com.*, 690-692, and are based on the advantage of giving the parties in such cases recourse to a national and impartial tribunal. When the American Constitution was drawn in 1787, local feeling was much stronger and local passions and animosities were much fiercer than in subsequent years. Vindictive feelings were entertained in many States against the beaten loyalist minority. Englishmen who had claims against American citizens failed to obtain their enforcement from 1783 until the Federal Courts were established in 1789. The framers of the Constitution considered that in disputes between citizens of different States it was desirable to vest jurisdiction in judges equally unconnected with the State of the plaintiff or the State of the defendant, judges who would not be suspected of bias or partiality and who would not be amenable to local influence or local prejudice—Bryce, *Am. Con.* 1st ed. I., p. 314.

The Commonwealth cannot be sued without the consent of its Parliament, but officers of the Commonwealth, both Ministerial and judicial, who neglect or refuse to perform their duties or who act in excess of or without legal authority may be called upon by any resident of the Commonwealth to show cause why a writ of mandamus or prohibition or injunction should not be issued against them requiring them to act according to law—see *Const.*, sec. 51 (xxxix.); sec. 75 (v.); sec. 78; *Jud. Act*, sec. 33.

ORIGINAL JURISDICTION OF THE HIGH COURT.

BY THE CONSTITUTION.—In conformity with the principle previously referred to requiring the preservation of a clear line of demarcation between the Judicial Power and Jurisdiction to exercise it, we will now proceed to enumerate the matters in which Original Jurisdiction has been conferred on the High Court :

The High Court has by the Constitution, sec. 75, Original Jurisdiction in all matters—

- I. Arising under any treaty :
- II. Affecting consuls, or other representatives of other countries :
- III. In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party :
- IV. Between States, or between residents of different States, or between a State and a resident of another State :
- V. In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

The foregoing Original Jurisdiction cannot be taken from the High Court by Federal legislation.

The term “matters” used in this section differs from the terms “cases” and “controversies” used in the corresponding section of the Constitution of the United States. The word “matters” is the widest, capable of embracing every possible kind of judicial procedure that could arise in the ambit of the section. “Matters” must be understood as a technical term used in judicial procedure between parties ; it is not synonymous with all “disputed law points” which may be of a political nature subject to decision by the political authorities—Von Holst, *Const. Law, U.S.*, p. 215 ; Quick and Garran’s *Annot. Const.*, p. 765.

BY FEDERAL LEGISLATION.—The High Court may receive additional original jurisdiction by legislation enacted by the Federal Parliament in the exercise of power conferred upon it by several sections of the Constitution. Thus Parliament when making laws for the peace, order, and good government of the Commonwealth with respect to the numerous powers conferred by the Constitution, sec. 51, could, if necessary, grant original jurisdiction to the High Court to deal with legal matters arising thereunder. In a more general way Parliament is authorized by the Constitution, sec. 76, to make laws conferring original jurisdiction on the High Court in any matter :—

- I. Arising under this Constitution, or involving its interpretation :
- II. Arising under any laws made by the Parliament:
- III. Of Admiralty and maritime jurisdiction :
- IV. Relating to the same subject-matter claimed under the laws of different States.

By the Constitution, sec. 78, Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the Judicial Power. We will now proceed to indicate the extent to which the original jurisdiction of the High Court has been enlarged by legislation under these sections.

1. ADDITIONAL ORIGINAL JURISDICTION BY SPECIAL ACTS.—Prior to the passing of the *Judiciary Act* a number of Federal Acts were passed which in express terms conferred original jurisdiction on the High Court in subjects dealt with by those Acts. By the *Customs Act* 1901, sec. 245, Customs prosecutions for the recovery of penalties or for the condemnation of ships or goods seized as forfeited may be instituted by action, information, or other appropriate proceedings in the High Court. Under the *Excise Act* 1901, sec. 134, excise prosecutions may be instituted in the High Court. Claims against the Commonwealth for compensation under the *Property for Public Purposes Acquisition Act* 1901, sec. 15, *et seq.*, may be instituted in the High Court. Under the *Commonwealth Electoral Act* 1902, the High Court is constituted a Court of Disputed Returns to deal with petitions against the validity of any Federal election or return. Under the *Patent Act* 1903 the High Court can deal with certain matters arising under that Act.

2 ADDITIONAL ORIGINAL JURISDICTION BY THE JUDICIARY ACT.—By the *Judiciary Act*, sec. 30, it is provided that, in addition to the matters in which original jurisdiction is conferred on the High Court by the Constitution, the High Court shall have jurisdiction “in all matters arising under the Constitution involving its interpretation.” The legislative power of the Constitution, sec. 78, has been exercised and is exercised by the *Judiciary Act*, Part IX., “Suits by and against

the Commonwealth and the States." As ancillary to its original jurisdiction the High Court has the same power to punish contempts of its authority, as was possessed at the commencement of the *Judiciary Act* by the Supreme Court of Judicature of England—Jud. Act, sec. 24. It has also jurisdiction to award costs in all matters brought before it, including matters dismissed for want of jurisdiction. The original jurisdiction of the High Court may, therefore, be summarised as follows :—

1. In all matters arising under any treaty :
 2. In all matters affecting consuls, or other representatives of other countries :
 3. In all matters in which the Commonwealth, or a person suing, or being sued on behalf of the Commonwealth, is a party :
 4. In all matters between States, or between residents of different States, or between a State and a resident of another State :
 5. In all matters in which a writ of mandamus, or prohibition, or an injunction, is sought against an officer of the Commonwealth :
 6. In any matter arising under the Constitution, or involving its interpretation :
 7. In matters in which jurisdiction is conferred by special acts :
 8. Any claims by any person against the Commonwealth :
 9. Any claim by any State against the Commonwealth :
 10. Any claim by any person against a State within the limits of the judicial power :
 11. Power to punish contempt of its authority :
 12. Jurisdiction to award costs in any matters brought before it.
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FEDERAL JURISDICTION OF THE STATE COURTS.

By the *Judiciary Act*, sec. 39, it is provided that the several Courts of the States shall, within the limits of their several

jurisdictions, whether such limits are as to locality subject matter or otherwise, be invested with Federal jurisdiction in all matters in which the High Court has original jurisdiction (excepting cases enumerated in sec. 31), and in which original jurisdiction can be conferred upon it. The *Judiciary Act*, secs. 56 and 58, authorizes persons having claims against the Commonwealth, or against a State, to bring suits in respect of such claims in the Supreme Court of the State in which such claims arise. The results of these provisions is that the State Courts, superior and inferior within the limits of their several jurisdictions, are authorized to entertain suits and proceedings as follows:—

1. In all matters affecting consuls, or other representatives of other countries :
2. In any claim by any person against the Commonwealth (in the Supreme Court of a State only) :
3. In any claim by any person against a State (in the Supreme Court of a State only) :
4. In all matters between residents of different States :
5. In all matters in which a writ of injunction is sought against an officer of the Commonwealth :
6. In any matter arising under the Constitution, or involving its interpretation :
7. In any matter arising under any laws made by the Parliament :
8. In any matter of Admiralty and Maritime jurisdiction :
9. In any matter relating to the same subject matter claimed under the laws of different States :
10. To hear and determine applications in any matter pending in the High Court.—*Jud. Act*, sec. 17.

Federal jurisdiction has been conferred on the several Courts of the States subject to certain expressed conditions and restrictions: The first condition is that every decision of the Supreme Court of a State in the exercise of Federal jurisdiction is final

and conclusive, except so far as an appeal may be brought to the High Court. Whenever an appeal lies from a decision of any Court or judge of a State to the Supreme Court of a State, an appeal from the decision may be brought to the High Court; thus if a Federal case be tried in an inferior Court of a State, and by the law of the State there is a right of appeal from the inferior Court to the Supreme Court, the appeal may be brought direct from the inferior Court to the High Court. Notwithstanding that the law of a State may prohibit any appeal from a decision of any Court or judge of a State the High Court may grant special leave to appeal to the High Court from the decision of any such Court or judge in the exercise of Federal jurisdiction. The Federal jurisdiction of a Court of summary jurisdiction of a State cannot be judicially exercised except by a Stipendiary, or Police, or Special Magistrate, or some Magistrate of a State who is specially authorized by the Governor-General to exercise such jurisdiction—Jud. Act, sec. 39.

ORIGINAL JURISDICTION OF STATE COURTS BY SPECIAL ACTS.
—Under the *Post and Telegraph Act*, sec. 151, offences against the Act, not being indictable offences, are punishable on summary conviction by the State Courts of summary jurisdiction. Indictable offences are punishable on trial by the Supreme Courts or other superior Courts of States. By the *Customs Act*, sec. 245, customs prosecutions may be instituted in the Supreme Courts of States and, where the penalty is below £500, in any State County Court, District Court, or Court of summary jurisdiction. The *Beer Excise Act* does not prescribe any particular Court in which proceedings for penalties may be instituted, but by the terms of the *Judiciary Act*, sec. 39, the several Courts of a State in which offences are committed would have jurisdiction. The *Distillation Act* is also silent respecting procedure in criminal cases, and consequently similar procedure would be applicable as in the case of the last mentioned Act. The *Excise Act*, sec. 135, provides that excise prosecutions may be commenced in a Supreme Court of a State or where the penalty does not exceed £500 in a State Court of summary jurisdiction. By the *Pacific Island Labourers Act* 1901, sec. 9, persons offending are liable to be tried before a Police, Stipendiary or Special Magistrate sitting as a Court of summary jurisdiction.

CRIMINAL JURISDICTION.

No provision is made for the trial of criminal cases in the High Court ; persons charged with offences against the laws of the Commonwealth can be prosecuted and convicted in the State Courts only. The laws of each State respecting the arrest and custody of offenders, the procedure for their summary conviction, their examination and commitment for trial on indictment, their trial and conviction on indictment, and for holding accused persons to bail, are made applicable to persons charged with the violation of Federal laws within that State. Such jurisdiction, however, cannot be judicially exercised with respect to the summary conviction or examination or committal for trial of any person except by a Stipendiary or Police or Special Magistrate. Indictable offences against the laws of the Commonwealth must be prosecuted by indictment in State Courts having jurisdiction to try such offences, in the name of the Attorney-General of the Commonwealth, or of such other person as the Governor-General may appoint in that behalf. A person charged with an indictable offence may, after committal and before the jury is sworn, apply to a Justice in Chambers, or a judge of the Supreme Court of a State for the appointment of counsel for his defence. If it be found that such accused person is without adequate means to provide defence for himself, and that it is desirable in the interests of justice that such an appointment should be made, the Justice or Judge is required to certify this to the Attorney-General, who, if he thinks fit, may thereupon cause arrangements to be made for the defence of the accused person—Jud. Act, sec. 69.

APPELLATE JUDICIAL POWER.

The Appellate Power gives to a superior Court the right to review or correct the decisions of a Court of inferior jurisdiction. The Appellate Jurisdiction may be exercised in a variety of forms prescribed either by common law or by statute ; it may be by special case stated by the Court below, or by points reserved, or by orders to review, or by writs issued by the Courts above such as writs of error, *certiorari*, *mandamus*, prohibition and

habeas corpus. The essential criterion of a Court of Appellate Jurisdiction is that it revises and corrects the proceedings in a cause already instituted in another Court; it does not originate that cause. Hence an application for a *mandamus* directed to a defendant as Secretary of State of the United States, requiring him to issue to the plaintiff a Commission of a Justice of the Peace which had been duly signed by the President of the United States and placed in the hands of the defendant for delivery, but not delivered, was held to involve an exercise of Original not Appellate Jurisdiction, but a *mandamus* directed to a Court, or Judge, who has refused to act as required by law in a proceeding already instituted, would be an exercise of the functions of a Court of Appeal.—*Marbury v. Madison*, U.S. 1 Cranch., 137. The issue of writs of *habeas corpus* on the application of persons in custody under Judicial Power such as warrants for imprisonment, orders for commitment, or writs of *capias ad satisfaciendum* would be the exercise of Appellate Power; the Court examines the validity of the authority under which the prisoner is detained.—*Per Story, J. in Ex parte Watkins*, U.S., 7 Pet. 568.

The Appellate Judicial Power of the Commonwealth is, by the Constitution, sec. 73, vested in the High Court. Subject to exceptions and regulations, such as Parliament may prescribe, it extends to all judgments, decrees, orders, and sentences: (1) of Justices of the High Court exercising Original Federal Jurisdiction; (2) of any other Federal Court or Court exercising Federal Jurisdiction; (3) of the Supreme Courts of States in the exercise of jurisdiction conferred by State laws, and (4) of the Inter-State Commission, as to questions of law only. The High Court may be thus regarded as a Federal Court of Appeal and a National Court of Appeal, and as such it holds a wider jurisdictional area than its great exemplar the Supreme Court of the United States, which cannot entertain appeals from State Courts not involving Federal questions.

This section confers a new right of appeal from the Supreme Courts of States in State law cases, but it does not abolish the existing right of appeal in those cases to the Privy Council. The latter right still remains. The High Court, though a general Court of Appeal for Australia, is not the sole or exclusive, but a concurrent, Court of Appeal in State law cases. Parties to cases

decided by the Supreme Courts of States have, therefore an alternative right of appeal, either to the Privy Council direct or to the High Court. A similar alternative right of appeal has for some time existed in New South Wales—and formerly existed in Victoria also—from a single judge sitting in the equitable jurisdiction of the Supreme Court, either to the Supreme Court in Banco or direct to the Queen in Council. See *Equity Act 1880* (N.S.W.), secs. 70, 79; *Equity Act 1901* (N.S.W.), sec. 89; *Dean v. Dawson*, 9 N.S.W.L.R. Eq. 27, and other authorities cited; *Rich's Practice in Equity*, p. 68: 15 Vict. No. 10 (Vic.); 19 Vict. No. 13 (Vic.), sec. 5; *Garden Gully v. McLister*, 1 App. Ca. 39; *Davis v. Reg.*, 1 V.L.R. Eq., 33; *Woolley v. Ironstone Hill Lead Co.*, 1 V.L.R. Eq., 237.) Under the *Supreme Court Act 1890* (Vic.) this right of appeal from a single judge of the Supreme Court in Victoria does not now exist. (*Australian Smelting Co. v. British Hill Proprietary Co.*, 23 V.L.R., 643; 20 A.L.T., 46.) Quick and Garran's Annot. Const., p. 738.

The Appellate Power is mapped out and conferred by the Constitution in terms partly positive and affirmative, and partly privative and negative. It is positive and affirmative to the extent and in the manner in which it confers on the High Court jurisdiction to entertain appeals. It is privative and negative in taking away from litigants in the High Court the right to appeal from the High Court to the Privy Council conferred by previous legislation and orders in Council thereunder.

The excepting and regulating power vested in the Federal Legislature has been declared by an eminent American jurist to be a most serious one. "It places the appellate power of the Court very nearly at the mercy of the legislature. The legislature has made use of this power in the passage of the several Judiciary Acts, and I do not know that it can be said to have abused it. It seems to me, however, an unnecessary surrender of the independence of the Courts to require that things which can be better accomplished by the rules of Court shall wait upon the pleasure, or, possibly, caprice of the Legislature."—Burgess, *Pol. Sc.*, ii., p. 331.

"The Constitution, further, expressly confers upon the Congress the power to regulate the appeal and removal of causes

from the Courts of the States, and from the inferior Courts of the general government, to the Supreme Court. This is also a discretionary power in the Congress. There is no doubt that Congress is under a stronger moral obligation to act when its action is necessary for the completion and regulation of the government machinery than when it has to deal with questions of policy merely, or even of individual rights; but it is placed under no stronger legal obligations; by inaction it may thus defeat many of the fundamental purposes of the Constitution without any redress, except such as may be secured at the election."—Burgess, *id.*, p. 158.

There is one limitation to the excepting and regulating power of Parliament; no exception or regulation prescribed by Parliament can prevent the High Court from hearing and determining any appeal from a Supreme Court of a State in any matter in which, at the establishment of the Commonwealth, an appeal lies from such Supreme Court to the King in Council. Until the Parliament otherwise provides, the conditions of and the restrictions on appeal to the King in Council from the Supreme Courts of the several States, are applicable to appeals from them to the High Court. The effect of this provision is practically to adopt, as a piece of preliminary federal legislation, separate codes of rules to govern appeals to the High Court from each State. As a matter of fact, these separate codes are to a great extent identical, so that there will from the outset be a considerable degree of uniformity; but complete uniformity can only be secured by federal legislation—Quick and Garran's *Annot. Const.*, p. 747. This federal legislation has been adopted and is embodied in the *Judiciary Act*, sec. 35.

The judgments of the High Court in appeal cases are declared by the Constitution to be final and conclusive, sec. 73. This takes away or negatives the legal right of litigants, in the High Court, to appeal to the Privy Council as a matter of right—(*Waterhouse v. Gilbert*, 15 Q.B.D., 569; *Bryant v. Reading*, 17 Q.B.D., 128; *Lyon v. Morris*, 19 Q.B.D., 139). A right of appeal may mean one of two things: The right of a party to claim an appeal to a higher Court; or the right of a higher Court to grant leave to appeal. In the case of the High Court, the only higher Court of which there is any question is the King in Council;

so that the discussion of rights of appeal from the High Court resolves itself into (1) the right of a party to claim an appeal to the King in Council; (2) the prerogative right of the King to grant leave of appeal to himself in Council—Quick and Garran's Annot. Const., 746. An appeal to the King in Council as a matter of right by statute must be distinguished from an appeal to the same tribunal as a matter of grace. The King has authority, by virtue of his prerogative, to review the decisions of all Colonial Courts, whether the proceedings be of a civil or criminal character, unless His Majesty has parted with such authority. (*Falkland Islands Co. v. Queen*, 1 Moo. P.C., N.S., 312; *Reg. v. Bertrand*, L.R., 1 P.C., 520; Macpherson P. C. Practice, p. 60; Todd Parl. Gov. in Colonies, p. 220.)—Quick and Garran, Annot. Const., p. 750.

Now, what the Constitution has done is to take away the appeal as a right, but it has left unimpaired any right which the King may be pleased to exercise by virtue of his prerogative to grant special leave of appeal from the High Court to His Majesty in Council—Const., sec. 74. To this reservation of the prerogative to grant leave there is, however, a most important exception. "No appeal can be permitted to the Queen in Council from a decision of the High Court upon any question howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth, and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council."—Const., sec. 74. "The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave." "The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for His Majesty's pleasure."—*id.*

The following is a summary of the Appellate Power: A litigant defeated in a State Court on a question of State law can, if his case is not excepted by Federal law, appeal to the High Court: or he can either appeal to the Privy Council under the present Orders in Council; or he can apply to the Privy Council

for special leave to appeal—that is, as a matter of grace. A litigant in a Court of Original Federal Jurisdiction can appeal only to the High Court.—*Judiciary Act*, sec. 35. A litigant in the High Court sitting as a Court of Appeal from any other Court, State or Federal, cannot appeal to the Privy Council in any case unless by special leave granted by the Privy Council, but even the Privy Council is not allowed to grant leave to appeal in the Constitutional Power Cases specified in the Constitution, sec. 74, unless the High Court certifies the question is one which ought to be determined by His Majesty in Council.

APPELLATE JURISDICTION.

By the *Judiciary Act*, sec. 35, Parliament has purported to exercise the power vested in it by the Constitution of deciding what shall be the exceptions, and subject to what regulations the High Court shall have jurisdiction to hear and determine appeals. Like the earlier Judiciary Acts of the United States on which it has been moulded, the *Judiciary Act*, in form at least, assumes the right to confer Appellate Jurisdiction affirmatively on the High Court rather than to make exceptions and limitations to the unqualified grant contained in the Constitution. The whole Appellate Jurisdiction is conferred by the Constitution itself, without the need of any intervention by the Parliament. In the absence of any statute prescribing exceptions or regulations, the jurisdiction exists without exception or regulation. This construction, which accords with principle, is now settled with regard to similar words in the United States Constitution. (*Durousseau v. United States*, 6 Cranch, 307; *Kent*, i., 325; *Story*, 1773.) In an earlier decision, however (*Wiscart v. Dauchy*, 3 Dall., 321), the Supreme Court considered that its whole appellate jurisdiction depended upon the regulations of Congress, as that jurisdiction was given by the Constitution in a qualified manner. "The Supreme Court was to have appellate jurisdiction, with such exceptions, and under such regulations as Congress should make; and if Congress had not provided any rule to regulate the proceedings on appeal, the Court could not exercise an appellate jurisdiction." (*Kent*, i., 324.) The early Judiciary Acts proceeded on this mistaken principle, and purported to confer jurisdiction

affirmatively ; but those Acts are now construed not as giving jurisdiction, but as making exceptions by implying a negation of jurisdiction in every case where jurisdiction does not purport to be affirmatively given."—Quick and Garrañ, Annot. Const., p. 738.

APPEALS FROM JUSTICES OF THE HIGH COURT.—The High Court, sitting as a Full Court, has jurisdiction to hear and determine appeals from all judgments whatsoever of any Justice or Justices exercising the original jurisdiction of the High Court, whether in Court or in Chambers.—Jud. Act, sec. 34.

APPEALS FROM STATE COURTS.—By the *Judiciary Act*, sec. 35, detailed provision is made respecting appeals from the Supreme Courts of the States to the High Court. These provisions are equally applicable to judgments, whether given or pronounced by those Supreme Courts in the exercise of Federal jurisdiction, or in the exercise of jurisdiction conferred by State laws. It is first declared that the Appellate Jurisdiction of the High Court extends to every judgment, whether final or interlocutory, given or pronounced in respect of any sum or matter at issue amounting to the value of £300, or involving any claim respecting any property or civil right amounting to the value of £300. It next declares that the Appellate Jurisdiction extends to every judgment, whether final or interlocutory, which affects the status of any person under the law relating to aliens, marriage, divorce, bankruptcy, insolvency. The section then goes on to enable the High Court to give special leave to appeal against any judgment, final or interlocutory, of the Supreme Court of a State in a civil or criminal matter, with respect to which the Court thinks fit. The Appellate Jurisdiction also extends to any judgment of the Supreme Court of a State given in the exercise of Federal jurisdiction in a matter pending in the High Court. By the *Judiciary Act*, sec. 39, sub-secs. (b) and (c), the High Court may entertain appeals direct from any Court or judge of a State exercising Federal jurisdiction.

A cursory examination of section 35 shows that it is not altogether a true and proper exercise of the excepting and regulating power ; that power should assume the form of a negative and privative enactment such as, "there shall be no appeal to the High Court from any judgment, final or interlocu-

tory, of the Supreme Court of a State (1) which is given or pronounced for or in respect of any sum or matter at issue less than £300 ; or (2) which involves directly or indirectly any claim, demand, or question to, or respecting any property, or any civil right amounting to or of less value than £300." Presented in a shorter form these two exceptions would read thus—(1) no appeal against any judgment for less than £300 ; (2) no appeal against any judgment involving property or civil right of less value than £300.

The remainder of the section may be thus summarised—In all other State Supreme Court cases, civil and criminal, except cases affecting the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy, or insolvency, there shall be no appeal to the High Court unless the High Court shall have previously granted leave to appeal.

This latter provision may be regarded as a method of exercising the regulating rather than the excepting power, that is to say, that in controversies not involving claims to money or property except marriage, divorce, alienage and other status cases there is no appeal unless the High Court grants special leave.

Very inappropriately, and with a singular disregard for the principles of classification, a portion of the Appellate Jurisdiction of the High Court is to be found described in the *Judiciary Act*, sec. 33, in Part IV., under the heading of "Original Jurisdiction." This section, which may, however, be regarded as simply declaratory of jurisdiction otherwise conferred expressly or impliedly, states that the High Court may make orders or direct the issue of writs of mandamus, prohibition, injunction, and *habeas corpus* in matters coming within the judicial power.

The Appellate Jurisdiction of the High Court may now be summarised as follows:—

1. Appeals from Justices of the High Court in all cases:
2. Appeals from Supreme Courts of States in cases in which the property, or civil right, involved exceeds £300 in value :
3. Appeals from Supreme Courts of States in all cases affecting the status of any person under laws

relating to aliens, marriage, divorce, bankruptcy, and insolvency :

4. Appeals from Supreme Courts of States in any civil or criminal case in which the High Court thinks fit to give special leave to appeal :
- (5) Appeals from State Courts exercising federal jurisdiction.—Jud. Act, sec. 39 (b) and (c) : *
6. Appeals from any judgment of the Supreme Court of a State in the exercise of Federal jurisdiction in any matter pending in the High Court.—See Jud. Act, sec. 17 :
7. Appeals in the shape of applications for writs of mandamus, commanding the performance by any Court invested with Federal jurisdiction of any duty relating to the exercise of its Federal jurisdiction.—Jud. Act, sec. 33 (a) :
8. Appeals in the shape of applications for writs of prohibition requiring any Court to abstain from the exercise of Federal jurisdiction which it does not possess.—Jud. Act, sec. 33 (b) :
9. Appeals in the shape of applications for writs of *habeas corpus* to examine the legality of warrants, under which it is alleged persons are detained in custody contrary to Federal laws.—Jud. Act, sec. 33 (e) :
10. Appeals in cases in which persons have been convicted for indictable offences against the laws of the Commonwealth in which the Courts before which the persons have been tried have reserved questions of law for the consideration of the High Court.—Jud. Act, sec. 72 :
11. Appeals against arrest of judgment in criminal trials.—Jud. Act, sec. 77.

The *Judiciary Act*, sec. 21, provides that the jurisdiction of the High Court to hear appeals from judgments of the Supreme

Courts of a State sitting as a Full Court must be exercised by a Full Court consisting of not less than three judges.

In the exercise of its appellate jurisdiction the High Court may affirm, reverse, or modify the judgment appealed from, and may give such judgment as ought to have been given in the first instance, and if the cause is not pending in the High Court may, in its discretion, award execution from the High Court, or remit the cause to the Court from which the appeal was brought for the execution of the judgment of the High Court; and in the latter case it is the duty of that Court to execute the judgment of the High Court in the same manner as if it were its own judgment.

CHAPTER II.

THE PROCEDURE AND PRACTICE OF THE HIGH COURT.

PROCEDURE DEFINED.

THE term procedure is commonly opposed to the sum of legal principles which constitute the substance of the law, and denotes the body of rules, whether of practice, or of pleading, or of evidence, whereby rights are effectuated through the successful application of proper remedies. Practice, according to Lord Westbury, *A.-G. v. Sillem*, 1864, 10 H. of L., 704, in its common and ordinary sense, denotes the rules that make or guide the *cursus curiæ* and regulate the proceedings in a cause within the walls or limits of the Court itself. The term properly includes the form and manner of instituting and conducting civil actions and criminal prosecutions through their various stages, from the commencement to final judgment and execution, according to the rules and regulations laid down by or under the Statutes governing judicial proceedings—Encyclopædia of the Laws of England, Vol. 10, pp. 284, 480.

The sources of the Procedure and Practice of the High Court are to be found in the (1) Statutes organizing the High Court and prescribing its procedure; (2) the Rules of the High Court made under statutory authority; (3) the particular procedure or practice of the Supreme Court of the State in which the High Court is sitting, where none is provided by the Statutes of the Commonwealth or Rules of Court.

(1) THE STATUTE LAW AS TO PROCEDURE AND PRACTICE.

The statutory provisions establishing the procedure and practice of the High Court are fundamental, and no procedure or

practice would be held to be valid which is inconsistent with the Statutes. The Acts regulating the procedure of the High Court are the *Judiciary Act* 1903, the *High Court Procedure Act* 1903, and where special jurisdiction is conferred upon the Court, the particular Statute conferring the jurisdiction. An illustration of this last-mentioned is the *Commonwealth Electoral Act*, in which are certain provisions regulating the procedure for the exercise by the High Court of its jurisdiction as a Court of Disputed Returns. It is proposed to specify those portions of procedure and practice directly prescribed by Statute, and which are, consequently, fundamental.

THE PROCESS OF THE COURT.—As the High Court has jurisdiction throughout the Commonwealth, the process of the High Court runs throughout the Commonwealth (*Jud. Act*, sec. 25). In order to show on the face of the documents that originate the proceeding, and of other documents issued by the Court, that they are issued under the authority of the Court, provision is made for sealing them with “the Seal of the High Court of Australia.” When documents are issued from a District Registry they are sealed with a duplicate of the seal, the word “Registry” being added with the name of the State prefixed (*H.C.P. Act*, sec. 3). All writs, commissions and process issued from the High Court must be in the name of the King, under the seal of the Court or other prescribed seal, signed by the Registrar or other proper officer, and tested in the name of the Chief Justice (*H.C.P. Act*, sec. 4). Writs and process issued from the High Court must be dated as of the day on which they are issued (*H.C.P. Act*, sec. 5). Under the *Judiciary Act* provision is made for the establishment of a Principal Registry at the seat of government and District Registries in the States. Writs of summons for the commencement of causes may be issued in any Registry, and the Registrar is under a duty to issue such writs when required. Unless an order to the contrary is made by the High Court or a Justice all such further proceedings as may and ought to be taken by the respective parties to the cause down to and including final judgment and execution may be taken and recorded in the District Registry in which the cause is pending (*H.C.P. Act*, sec. 6).

APPEARANCE.—The defendant, after he is served with a writ

of summons, enters an appearance in the Registry from which the process issued. If the defendant, against whom a writ is issued in a District Registry, neither resides nor carries on business in the State in which the Registry is situated, he may appear either at that Registry or the Principal Registry. If any defendant appears at the Principal Registry, the cause proceeds in that Registry and the proceedings in the cause are duly transmitted to that Registry (H.C.P. Act, sec. 6).

Where there are several defendants in a cause pending in the High Court, if any defendant is not served with process and does not voluntarily appear, the Court may, nevertheless, entertain the cause and proceed to hear and determine it between the parties who are properly before the Court. The judgment given in such a case, however, is not conclusive against, and does not operate to, the prejudice of other parties who are not regularly served and do not voluntarily submit to the jurisdiction of the Court (Jud. Act, sec. 28). This provision is taken from the United States Statutes (U.S.R.S., sec. 737). If the decisions of the American Courts be followed then as regards equity cases persons having an interest and who should be made parties, are necessary parties without whom no decree can be entered. (*Shields v. Barrow*, 17 How., 130). When in any suit of which the High Court has original jurisdiction the defendant is not a resident of or found within the Commonwealth, and does not voluntarily appear, the Court may, nevertheless, proceed to exercise its jurisdiction after such notice to the defendant and upon such terms as are prescribed by rules of Court (Jud. Act, sec. 29). Upon this section is based the service of originating proceedings or notice in lieu thereof upon persons out of the jurisdiction (Or. 8, r. 1). The power of a colonial Parliament to make such a law was questioned but affirmed by the Privy Council (*Ashbury v. Ellis*, (1893) A.C. 339).

TRANSFER OF CAUSES.—For various reasons it may be desirable to have a cause removed from one Registry to another. Any party to a cause may at any time apply either in Court or Chambers for an order that the cause be transferred, and the Court or Justice may in his discretion order accordingly (H.C.P. Act, sec. 7). The proceedings and original documents (if any) filed in the Registry in which the cause is pending are thereupon

transmitted by the Registrar of that Registry to the Registry to which the cause is ordered to be transferred. The cause thenceforth proceeds in that Registry as if it had been originally commenced there. It may afterwards be again transferred in like manner to any other Registry.

When any party to a cause desires to make an application therein to the Court or a Justice, and no Justice of the High Court is present in the place where the Registry in which the cause is pending is situated, the party may lodge with the Registrar of that Registry a request that the cause be transferred, for the purpose of the application only, to some other Registry at a place where a Justice is present or is appointed to sit. The cause shall thereupon, without further order, be transferred accordingly (H.C.P. Amendment Act 1903, sec. 2). After the application is made the cause is retransferred (H.C.P. Act, sec. 8). For the purpose of expediting such an application it is provided that the contents of the necessary documents may be telegraphed. The effect of the order may also be telegraphed to the Registrar of the District in which the cause is pending (H.C.P. Act, secs. 9, 10). The Registrar may by consent of parties, instead of transmitting by telegraph the full contents of any document transmit a summary thereof certified by him to be complete and correct, and the summary may be received and acted upon by the Court or Justice as if it were a copy of the original document (H.C.P. Act, sec. 11).

VENUE.—The cause may be transferred from one Registry to another for all purposes. It may, however, not be desirable to have the cause entirely transferred, but it may be desirable to have the trial held at some particular place. The High Court or a Justice may at any stage of a suit pending in the Court, direct that the trial shall be had at some particular place to be specified in the order, subject to such conditions (if any) as the Court or Justice imposes (H.C.P. Act, sec. 25). The fixing of the venue for trials of actions is generally provided for in the rules. In the rules set out in the Schedule the plaintiff may in his writ or statement of claim name a place for trial which place must be within the State in which the cause of action arose. When no place of trial is named, the place of trial is the place in which the Registry from which the writ was issued is situate.

(Or. 30, r. 1). The venue in revenue cases is regulated by sec. 82 and the following sections of the *Judiciary Act*. Suits to recover pecuniary penalties and forfeitures under the laws of the Commonwealth may be brought either in the State or part of the Commonwealth where they accrue or in the State or part where the offender is found. Suits to recover taxes accruing under any revenue law of the Commonwealth may be brought either in the State or part of the Commonwealth where the liability for the tax occurs or in the State or part where the debtor resides. Proceedings on seizures made on the high seas for forfeiture under any law of the Commonwealth may be prosecuted in any State into which the property seized is brought. Proceedings on such seizures made within any State or part of the Commonwealth shall be prosecuted in the State or part where the seizure is made except in cases when it is otherwise provided by law.

TRIAL OF ISSUES.—In the Constitution there is no reference to the trial of civil issues by jury. It is left open to Parliament under section 51 (xxxix) to legislate for such trials. In criminal cases the right to jury is preserved under sec. 80 of the Constitution, which provides that trials “on indictment” shall be by jury. The *High Court Procedure Act*, sec. 12, enacts that in every suit in the High Court, unless the Court or a Justice otherwise orders, the trial shall be by a Justice without a jury. That lays down the general rule that a trial in civil cases shall be by a Justice sitting alone, and it is for him to decide all questions of fact and of law. Trial by jury shall only be when a special application is made to the Court or a Justice. The application for the trial with a jury of the suit, or any issue of fact, may be granted in any suit in which the ends of justice appear to render that mode of inquiry expedient. For the purpose of the trial with a jury the High Court or a Justice may make all such orders, and issue all such writs, and cause all such proceedings to be had and taken as the Court or Justice thinks fit.

Upon the finding of the jury the Court or Justice may give such decision, and pronounce such judgment, as the case requires (H.C.P. Act, sec. 13). In any case in which the High Court or a Justice is authorised to direct the trial of an issue, or in which a new trial is granted, the Court or a Justice may impose such conditions on the parties respectively, and may direct such

admissions to be made by them or either of them for the purpose of the trial or new trial as may be just. In the case of a new trial the High Court or a Justice may grant it generally, or on some particular points only, and may order that testimony of any witness examined at the former trial may be read from the Justice's notes instead of their being again examined in open Court (H.C.P. Act, sec. 14). When the High Court sits in a State, the laws of the State relating to juries in civil actions in the Supreme Court apply to the trial of civil actions in the High Court (H.C.P. Act, sec. 15).

EVIDENCE.—The general rule as regards evidence is that when the High Court sits in a State the laws of that State relating to evidence and the competency of witnesses are binding on the Court. If any of these laws be contrary to the Constitution or any law of the Parliament then they do not apply to the High Court (Jud. Act, sec. 80). The testimony at the trial of a cause must be given orally in open Court except in special cases or where the parties in a suit agree to the contrary (H.C.P. Act, sec. 21). The Justices of the High Court have power to make rules of Court for regulating the means by which particular facts may be proved, and the mode in which the evidence thereof may be given (H.C.P. Act, sec. 16).

On the hearing of any matter, not being the trial of a cause, evidence may be given by affidavit or orally as the Court or Justice directs. At the trial of a cause, proof may be given by affidavit of the service of any document incidental to the proceedings in the cause, or of the signature of a party to the cause or his solicitor to any such document. The High Court or a Justice may at any time for sufficient reason order that any particular facts in issue in a cause may be proved by affidavit at the trial, or that the affidavit of any person may be read at the trial of a cause, on such conditions in either case as are just. But such an order must not be made if any party to the cause desires in good faith that the proposed witness should attend at the trial for cross-examination (H.C.P. Act, sec. 20). When granting a new trial the Court may order the testimony of any witness examined at the former trial to be read from the Justice's notes instead of his again being examined in open Court (H.C.P. Act, sec. 14).

The High Court or a Justice may, in any suit or civil matter pending in the Court and at any stage of the proceedings, order the examination of any person upon oath orally or on interrogatories before the Court or a Justice or before any officer of the Court or other person, and at any place within the Commonwealth ; or may order a commission to be issued to any person either within or beyond the Commonwealth authorizing him to take the testimony on oath of any person orally or on interrogatories ; and may by the same or any subsequent order give any necessary directions touching the time place and manner of any such examination ; and may empower any party to the suit or civil matter to give in evidence in the suit or matter the testimony so taken on such terms (if any) as the Court or Justice directs (H.C.P. Act, sec. 19).

The Court has full power to compel the parties to produce any books or writings in their possession or power which contain evidence pertinent to any issue in the suit. If the plaintiff fails to comply with the order the Court may dismiss the suit. If the defendant fails to comply with the order the Court may give judgment against him as by default (H.C.P. Act, sec. 17). The High Court has power to require and administer all necessary oaths and affirmations, the forms being as nearly as may be those used in the Supreme Court of the State in which the oath or affirmation is administered (H.C.P. Act, sec. 15). The Chief Justice may issue commissions to persons within or beyond the Commonwealth authorising them to administer oaths and take affirmations for the purposes of the High Court and proceedings therein (H.C.P. Act, sec. 22).

APPEALS.—The procedure and practice with respect to appeals to the High Court is for the most part regulated by rules made by the Justices of the High Court. There are, however, certain statutory provisions dealing with the subject. In any appeal to the High Court, security, except under an order of the High Court, is not required to be given by the appellant. This rule does not apply in the case of appeals from a judgment of the Supreme Court of a State or some other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council. In the last mentioned appeals security is given in the manner prescribed by rules of Court for the prosecution of

the appeal without delay, and for the payment of all such costs as may be awarded to the respondent (H.C.P. Act, sec. 35). The amount of security may in any case be reduced or increased by the High Court or a Justice. In the case of an increase it may be ordered that, unless the additional security is given within a time to be limited by the order, the appeal shall be dismissed (H.C.P. Act, sec. 36). When an appeal has been instituted the High Court or a Justice may order a stay of proceedings under the judgment appealed from (H.C.P. Act, sec. 38). Should either party to a judgment from which an appeal lies to the High Court die before the time allowed for instituting an appeal has expired, it is not necessary to revive the cause or matter by any formal proceedings. If the personal representative of the deceased party desires to appeal, he may file in the Court in which the cause or matter is pending a duly certified copy of the instrument by which he is appointed, and thereupon may institute an appeal in the same manner as the party whom he represents might have done. In the case of the death of the party in whose favour the judgment is given or made, notice of appeal may be given to his personal representative or, if there is no such representative, to such person as the High Court or a Justice directs (H.C.P. Act, sec. 39).

(2) RULES OF COURT.

So far as the procedure and practice are laid down in the *Judiciary Act* and the *High Court Procedure Act* the regulating provisions are fundamental. The Justices of the High Court or a majority of them have power to make rules of court regulating all matters of practice and procedure in the High Court and other Federal Courts, and also so far as is necessary in Courts of Federal jurisdiction (Jud. Act, sec. 86 ; H.C.P. Act, sec. 33). These rules must not be inconsistent with the *Judiciary Act* or the *High Court Procedure Act*. A set of rules is contained in the Schedule to the latter Statute. These Rules are in force, but the Justices of the High Court may annul, alter or re-enact them with or without amendment (H.C.P. Act, ss. 32, 33). All such statutory rules must be laid before Parliament within a specified time, and may be annulled by the Governor-General on an address from

either House. There is no provision that the Rules shall take effect as if enacted in the Statutes. Where such an enactment is made the Rules cannot be called in question; (*Institute of Patents v. Lockwood*, 1894, A.C., 347), but, where the statutory power does not contain this or a similar provision, the Court can canvass a rule and determine whether or not it was within the power of those who made it. (*Ib.*, per Lord Herschell). In 1864 regulations made as to the practice and procedure on the revenue side of the Exchequer were declared invalid by the House of Lords (*A.-G. v. Sillem*, 10 H.L., 704). The Justices may also make rules for regulating the means by which particular facts may be proved, and the mode in which the evidence thereof may be given. They may make rules as to the time for and manner of instituting appeals (H.C.P. Act, sec. 37). Special jurisdiction is conferred upon the High Court by other Statutes and in these power is also conferred upon the Justices to declare the necessary procedure. Under the *Commonwealth Electoral Act* 1901, Part XVI., sec. 193, the High Court is constituted a Court of Disputed Returns and has jurisdiction to try election petitions. Sec. 206 enacts that the Justices may make rules for carrying this part of this Act into effect, and in particular for regulating the practice and procedure of the Court, the forms to be used, and the fees to be paid by parties. Again, under the *Property for Public Purposes Acquisition Act* 1901, sec. 25, power is given to the Justices to make rules for prescribing the manner in which applications may be made for the disposal of money paid or deposited under the Act. The power to make rules of Court includes a power to make rules for the purpose of the Act which directs or authorises anything to be done by Rules of Court (*Acts Interpretation Act* 1901, sec. 28 (2)). The power of making rules is now subject to the *Rules Publication Act* 1903.

(3) PROCEDURE AND PRACTICE OF THE STATE COURTS AS APPLICABLE TO THE HIGH COURT.

The plan of the *Judiciary Act* is to enable the High Court to sit in any place in the Commonwealth when required. The

intention is also to utilise the State machinery as much as possible. When the High Court sits in a State it is regulated as far as procedure is concerned by the laws of the Parliament and any Rules of Court made under such statutory authority. When no such procedure is provided then recourse must be had to the particular laws of the State where the Court is sitting. The laws of the State, including the laws relating to procedure, evidence, and the competency of witnesses are binding upon the High Court exercising jurisdiction in that State in all cases to which they are applicable (Jud. Act, sec. 79). The same set of laws are thus binding upon the State Supreme Court and the High Court. This enactment is taken from the United States law. (Rev. Stat., s. 721). "The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence."—*Per* Bradley, J., *Foster's Federal Practice*, p. 878. Questions will consequently arise as to whether the High Court will be bound by the decisions of State Courts as to matters of statutory interpretation. In the United States, without sacrificing their own dignity as independent tribunals, and their right of independent interpretation, for the sake of harmony the Federal Courts endeavor to avoid unseemly conflict. (See *Desty's Federal Procedure*, § 241, for decisions on this section). The Justices of the High Court will probably follow the precedent of the judges of the federal courts of the United States in the deference paid to the decisions of State judges upon the construction of State statutes. In the case of

Bond v. The Commonwealth, decided on November 19th, 1903. His Honor the Chief Justice remarked in reference to a decision of the Supreme Court of Victoria:—"This Court would in any case be reluctant, as a general rule, to put a different construction upon the statutes of a State from that which the Supreme Court of the State itself had decided to be their true construction; unless at any rate its intervention was directly invited by way of appeal either from the same Court or the Court of another State involving the construction of identical words."

It has been contended that apart from any enactment "except in relation to the executive powers of the Crown there cannot be any federal common law in Australia and that the federal courts of the Commonwealth will not possess any jurisdiction under the Common Law."—*Australian Constitutional Law*, A. Inglis Clark, p. 190. But see also Quick and Garran's *Annot. Const.*, p. 785. This matter has been expressly dealt with by the Parliament. By section 80 of the *Judiciary Act* it is enacted that so far as the laws of the Commonwealth are not applicable, or so far as their provisions are insufficient to carry them into effect or to provide adequate remedies or punishment, the Common Law of England governs a Court exercising federal jurisdiction both in civil and criminal matters. The Common Law applies, however, as modified by the Constitution, and by the Statute Law in force in the State in which the Court is sitting, and so far as it is applicable and not inconsistent with the Constitution and any law made by the Commonwealth Parliament. When the High Court sits in a State the laws of that State relating to the qualification of jurors, the preparation of jury lists and jury panels, the summoning, attendance, and impanelling of juries, the number of jurors, the right of challenge, the discharge of juries, the disagreement of jurors and their remuneration, for the purpose of the trial of a civil matter in the Supreme Court, apply to the trial of civil matters with a jury in the High Court in that State. The panel of the jurors, however, is made out and the jurors are summoned by officers of the Commonwealth (*H.C.P. Act*, sec. 15).

The judgments and orders of the High Court have effect and may be executed throughout the Commonwealth. But deference is paid to the State laws as to the remedies for enforcing judg-

ments. A person in whose favour a judgment is given is entitled to the same remedies for enforcing it by execution or otherwise (a) against the property of the person against whom it is given; and (b) subject to limitations which may be prescribed by any Rules of Court, against the person against whom it is given, as are allowed by the laws of the State in which such property is situated or such person is resident, as the case may be, to persons in whose favour a judgment of the Supreme Court is given in like cases (H.C.P. Act, sec. 26). In the event of interpleader in case of execution the Marshal or his Deputy takes interpleader proceedings in the Supreme Court in which the property is situated as if the process had been issued out of the State Supreme Court (H.C.P. Act, sec. 27); and the seizure or attachment of the property is inoperative when any event occurs by which according to the laws of the State in which the property is situated the seizure or attachment would be inoperative if made upon like process issued out of the Supreme Court of that State (H.C.P. Act, sec. 28). Again, receivers or managers appointed by the High Court in any pending action when in possession of property are bound to manage and deal with the property according to the requirements of the laws of the State in which the property is situated (H.C.P. Act, sec. 29). The forms of oaths and affirmations of the States are also followed as nearly as may be (H.C.P. Act, sec. 18).

No provision has yet been made for supplementing the procedure and practice of the High Court in the exercise of its original jurisdiction at the seat of Government when territory has been acquired for that purpose.

COMPLETE JUSTICE TO BE DONE IN EACH ACTION.

The administration of justice in the High Court follows the principles of the *Judicature Act*. The fundamental idea of the founders of that Act was the avoidance of multiplicity of proceedings. In the exercise of its original jurisdiction the same principle is applied to the High Court. There are not separate Courts of Equity and Common Law, each granting its peculiar remedies. The High Court in the exercise of its original jurisdiction may make and pronounce all such judgments as are

necessary for doing complete justice in any cause or matter before it. It may for the execution of any such judgment in any part of the Commonwealth direct the issue of such process whether in use in the Commonwealth before the commencement of the *Judiciary Act* or not, as is permitted or prescribed by that Act or any Act or by rules of Court (*Judiciary Act*, sec. 31). Under the *Judicature Act* "whenever a subject of controversy arises in an action, which can be conveniently determined between the parties to the action, the Court should if possible determine it, so as to prevent further and needless litigation;" *per* Jessel, M.R., *In re Tharp*, 3 P.D. 81; *Hedley v. Bates*, 13 C.D. 501. The object is that all matters in controversy shall be dealt with in one action and before one Court. The High Court in the exercise of its original jurisdiction in any cause or matter pending before it, whether originated in the High Court or removed into it from another Court, has power to grant absolutely or on such terms and conditions as are just all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter, so that as far as possible all matters in controversy between the parties regarding the cause of action or arising out of or connected with the cause of action may be completely and finally determined, and all multiplicity of legal proceedings concerning any such matters may be avoided (*Judiciary Act*, sec. 32). When the plaintiff makes a claim, the defendant is entitled to, and to avoid multiplicity of action should, set up by way of defence and cross-claim any valid defence to or claim arising out of or connected with the plaintiff's claim. In such an action the Court can finally adjust all claims arising.

AMENDMENT.—As a complement to this the widest power of amendment is necessary, so as to enable defences or claims to be made at any time before judgment. The High Court or a Justice may at any time and on such terms as are just amend any defect or error in any proceedings in the Court. All necessary amendments must be made for the purpose of determining the real question in controversy or otherwise depending on the proceedings. (H.C.P. Act, sec. 23). Neither formal defects nor irregularities are allowed to invalidate proceedings in the High Court, unless

the Court is of opinion that substantial injustice has been caused thereby, and that the injustice cannot be remedied by an order of the Court (*ib.*, sec. 24).

OUTLINE OF THE PRINCIPAL PROCEEDINGS IN AN ACTION.

WRIT OF SUMMONS.—An action is commenced by a writ of summons, which is a mandatory document from the Sovereign commanding the person to whom it is addressed to cause an appearance to be entered for him in the High Court of Australia and notifying him that in default of his so doing the plaintiff may proceed in the action and judgment be given in his absence (Form No. 1). The writ is in the name of the King, is under the seal of the High Court or other prescribed seal, and signed by the Registrar or other proper officer, tested in the name of the Chief Justice (H.C.P. Act, sec. 4; Or. 49, r. 3), and dated as of the day on which it is issued (H.C.P. Act, sec. 5). It contains the names of the parties, the command of the Sovereign, the memorandum stating the time for the service of the writ, and that appearance may be entered by the defendant at the Principal or District Registry, as the case may be, and that if the defendant neither resides nor carries on business in the State in which the District Registry is situate, his appearance may be entered either at the District Registry mentioned or at the Principal Registry (Form No. 1).

INDORSEMENT.—There must be indorsed on the writ a concise statement of the nature of the claim made, or of the relief or remedy sought in the action (Or. 4, r. 1). The writ must also have indorsed upon it the address of the plaintiff and the name and the place of business of his solicitor. If the solicitor is the agent only of another solicitor he must add the name and the place of business of the principal solicitor (Or. 1, r. 3). When the plaintiff sues in person he must indorse upon the writ an address for service if his place of residence is more than one mile from the Registry (Or. 1, r. 4).

CONCURRENT WRITS.—The plaintiff may at the time of or any time during twelve months after the issue of the original

writ issue one or more concurrent writs (Or. 5, r. 1). A writ of summons to be served out of the jurisdiction or of which notice is to be given out of the jurisdiction, under Or. 8, r. 1, may be issued as a concurrent writ, with a writ to be served within the jurisdiction; and a writ to be served within the jurisdiction may be issued as concurrent with a writ to be served out of the jurisdiction or of which notice is to be given out of the jurisdiction (Or. 5, r. 2).

RENEWAL OF WRITS.—The original writ remains in force for twelve months. If within that time the defendant be not served then the Court or a Justice, on the application of the plaintiff, and if satisfied that reasonable efforts have been made to effect service on the defendant or for other good reason, may order the renewal of the writ for six months (Or. 6, r. 1).

SERVICE OF WRIT.—After the writ has been duly prepared and issued it must be served on the defendant personally, unless his solicitor undertakes to accept service and enters an appearance (Or. 7, r. 1). It may be served anywhere within the Commonwealth (Jud. Act., sec. 25). Service is effected by delivering to and leaving with the defendant a copy of the writ, and at the same time showing him the original (Or. 7, r. 2). Special provision is made for the service on certain persons. Where a husband and wife are both parties they must both be served (Or. 7, r. 3); where an infant is a party service may be made upon his father or guardian, or, if he has none, then upon the person with whom he resides or under whose care he is, or the Court may order service on the infant himself (Or. 7, r. 4). Service on a lunatic defendant may be made on his committee, or if he has not been declared of unsound mind, or if he has been so declared but no committee appointed, service may be made on the person with whom he resides or under whose care he is (Or. 7, r. 5).

In the absence of statutory provision service on a corporation is made by serving on the mayor or other head officer, or the town clerk, manager, or other chief officer within the Commonwealth (Or. 7, r. 6). Partners may be served by service of the writ upon some one or more of the partners, or at the principal place, within the Commonwealth, of the business of the

partnership upon some person having at the time of service control or management of the business there (Or. 36, r. 5).

SUBSTITUTED SERVICE.—If a defendant cannot be promptly served personally, the Court or a Justice may make an order for substituted service, or for the substitution for service of notice by advertisement or otherwise (Or. 7, r. 8).

SERVICE OUT OF THE JURISDICTION.—When the defendant is a British subject outside the jurisdiction in the special cases enumerated in Or. 8, r. 1, the writ may be served upon him out of the jurisdiction. If it appears that he was personally served, or reasonable efforts were made to effect personal service, and that it came to the defendant's knowledge, and either that he wilfully neglects to appear in the cause or that he is living out of the jurisdiction in order to defeat and delay the plaintiff, the Court or a Justice may direct that the plaintiff be at liberty to proceed in the cause (Or. 8, r. 2). If the defendant be out of the jurisdiction and be neither a British subject nor in British Dominions, notice of the writ may be served upon him, and similar proceedings taken as in the case of a British subject out of the jurisdiction (Or. 8, r. 3). The person serving a writ must within three days after service, indorse upon it the day of the month and week of service (Or. 7, r. 7).

APPEARANCE.—The defendant, after service, must enter his appearance to the writ of summons in the District Registry from which the writ was issued or at his option, when he neither resides nor carries on business in the State in which the Registry is situated, either at that Registry or at the Principal Registry (H.C.P. Act, sec. 6 (2), Or. 9, r. 1). Appearance must be entered within the specified times limited in the writ according to the place of service (Or. 4, r. 10). Appearance is entered by delivering to the proper officer a memorandum in writing dated on the day of its delivery and containing the name of the defendant's solicitor, or stating that he appears in person. A duplicate of the memorandum must be delivered to the officer at the same time, which, when duly sealed, operates as a certificate of appearance (Or. 9, r. 2). The memorandum must contain the name and address of the defendant's solicitor, and if the defendant appears in person, his address and an address for service (Or. 9, rr. 3, 4). If two or

more defendants appear by the same solicitor and at the same time, the names of all the defendants must be inserted in one memorandum (Or. 9, r. 7). When an infant is a defendant his solicitor, on applying to enter an appearance, must file an affidavit in which he swears that the person mentioned is a fit and proper person to act as guardian *ad litem* of the defendant, and has no interest in question in the cause adverse to the infant. The written consent of the guardian must be annexed (Or. 9, r. 13, App., Form No. 8).

NOTICE OF APPEARANCE.—The defendant on the day on which he enters appearance gives notice to the plaintiff's solicitor or to the plaintiff if he sues in person, of his appearance. The notice may be given either by notice in writing served in the ordinary way at the address for service or by prepaid letter and shall in either case be accompanied by the sealed duplicate memorandum (Or. 9, r. 8).

CONDITIONAL APPEARANCE.—Entry of appearance without a denial of jurisdiction has been held to preclude the question of jurisdiction being raised. The defendant, if he intends to deny jurisdiction may enter a conditional appearance denying the jurisdiction of the Court. He shall not thereby be deemed to have submitted to the jurisdiction. He may thereupon apply to the Court or Justice for an order to set aside the service upon him of the writ or notice thereof as the case may be (Or. 9, r. 12).

PLEADINGS.—The next step after the appearance of the defendant is the delivery by the plaintiff of his statement of claim. A commencement is thus made in the pleadings. Every pleading must contain a statement, as brief as the nature of the case allows, setting out the material facts on which the party pleading relies to support his claim or defence. Material facts only must be stated, not the evidence by which the facts are to be proved. When necessary the pleadings must be divided into paragraphs numbered consecutively, and each containing, as nearly as may be, a separate allegation (Or. 14, r. 1).

THE STATEMENT OF CLAIM.—The plaintiff need not deliver to the defendant any pleading in which he formally sets out his case unless the defendant at the time of entering his appearance or within ten days thereafter gives notice that he requires such a

pleading. The pleading then delivered by the plaintiff is called the "Statement of Claim" (Or. 16, r. 4). The statement of claim, after setting out concisely all the material facts in conformity with the rules of pleading, must state specifically the relief or remedy which the plaintiff claims, whether singly or in the alternative (Or. 14, r. 2 ; Or. 16, r. 3).

STATEMENT OF DEFENCE.—The defendant if he intends to dispute the plaintiff's claim must deliver to defendant his answer to the claim, this is called the Statement of Defence. The defence may contain a general denial of the allegations in the statement of claim (Or. 14, rr. 15, 18, 19), or a specific denial of allegations of fact (Or. 14, r. 10), or may set up special facts and grounds of defence, or raise issues of law (Or. 14, r. 26). The defendant may also pay money into Court by way of satisfaction of the plaintiff's claim, and with or without a denial of his liability. This the plaintiff may accept, and if he do the action will then be stayed (Or. 18). If the money be not taken out in satisfaction then the action proceeds.

CROSS-CLAIM.—A defendant may plead by way of set-off or set up by way of cross-action against the claim of the plaintiff, any right or claim arising out of the plaintiff's claim, whether the set-off or cross-claim sound in damages or not. The set-off or cross-claim has the same effect as a cross-action so as to enable the Court to pronounce a final judgment in the same action, both on the original claim and on the cross claim (Or. 14, r. 3). The cross-claim is not as wide as the counter-claim provided for in the rules under the English *Judicature Act*, as it must arise out of or be connected with the plaintiff's claim (Jud. Act, sec. 32.)

If the set-off or cross-claim cannot be conveniently disposed of in the pending action, the Court or a Justice may order it to be struck out or disposed of separately (Or. 14, r. 3).

If the plaintiff is not required to deliver a statement of claim then the defendant must deliver a defence within sixteen days after his appearance (Or. 17, r. 7). When a statement of claim is delivered the defendant must deliver the defence within eight days of the delivery of the claim or from the time limited for appearance whichever is the later time (Or. 17, r. 6).

REPLY.—The plaintiff may within eight days after the defence has been delivered deliver a reply (Or. 19, r. 1). This generally contains the joinder of issue, but by way of confession and avoidance it may contain admissions of the allegation in the defence, and set up other matter specifically in answer thereto (Or. 14, r. 16). The joinder of issue operates as a denial of every material allegation of fact in the pleading upon which issue is joined (Or. 14, r. 17). If the defendant sets up a defence by way of cross-action the plaintiff in his reply may set up any matter arising out of the facts alleged in the defence which would be available to him as a defence if the defence were a statement of claim in an action against him. He may so plead notwithstanding that the reply may in itself be in the nature of a cross-action (Or. 17, r. 10). No pleading subsequent to a reply other than a joinder of issue can be pleaded without leave of the Court or a Justice (Or. 19, r. 2).

CLOSE OF PLEADINGS.—As soon as any party has joined issue upon the preceding pleading of the opposite party simply without adding any further pleading thereto, the pleading as between the parties shall be deemed to be closed (Or. 19, r. 4).

DEMURRER.—Points of law may be raised by the pleadings (Or. 14, r. 26), and any party may also demur to any pleading of the opposite party on the ground that the facts alleged in it do not show any cause of action, claim for damages, ground of defence, set-off, cross-claim, or reply, as the case may be (Or. 21, r. 1). The demurrer must be delivered as any other pleading (r. 3). The party whose pleading is demurred to may amend on payment of costs (Or. 21, r. 8). When delivered either party may set the demurrer down for argument before the Court. If the demurrer be not set down and notice given within ten days after delivery, and the party whose pleading is demurred to does not amend within that time, then the demurrer shall be held sufficient, with the same result as to costs as if it had been allowed on argument, and the same judgment may be entered thereon (Or. 21, r. 7). When a demurrer to the whole of any pleading, so far as it relates to a separate cause of action, is allowed or overruled, the Court gives such judgment as upon the pleadings the successful party appears to be entitled to (Or. 21, r. 10). Where demurrer is allowed to a part of a pleading that

part is deemed to be struck out (r. 11). When a demurrer is overruled the Court may allow the demurring party to raise by further pleading any case he desires to set up in opposition to the matter demurred to (Or. 21, r. 12). Questions of law may be also raised by special case (Or. 29).

TRIAL WITHOUT PLEADINGS.—Trial of the action may, however, be held without pleadings. When the indorsement of the writ contains a statement sufficient to give notice of the nature of the plaintiff's claim, the plaintiff may also indorse on it a notice that if the defendant appears the plaintiff intends to proceed to trial without pleadings (Or. 13, r. 1). In such a case no pleadings are delivered except by order of the Court, and trial may accordingly proceed. The defendant may apply for a statement of claim. If such an application be not granted the Judge may order the trial to proceed without pleadings, and also require either party to deliver particulars of his claim or defence (Or. 13, r. 3). The parties may also agree to the trial of questions of fact without pleadings (Or. 29, r. 9, *et seq.*).

AMENDMENT.—Ample provision is made in both the High Court Procedure Act and rules for amendment. Under sec. 23 the High Court or a Justice may amend any defect or error in any proceedings. All necessary amendments must be made for the purpose of determining the real questions in controversy. The Court or a Justice may in any cause or matter, and at any stage allow or direct either party to alter or amend the writ of summons or any indorsement thereon, or any pleadings or other proceedings, in such manner and on such terms as are just (Or. 24). The plaintiff may, without leave, amend his statement of claim before replying (Or. 24, r. 3), and a defendant who has pleaded a set-off may without leave amend the set-off before pleading to the reply (*Ib.*, r. 4). When any party has amended his pleading or indorsement, the opposite party must plead to the amended pleading or indorsement or amend his pleading. If he has pleaded and does not amend then he shall be deemed to rely on his original pleading (Or. 24, r. 6).

INTERLOCUTORY APPLICATIONS.—Before the trial is proceeded with it is nearly always necessary to make interlocutory applications of some kind. After the appearance of the defen-

dant a general summons for directions may be taken out (Or. 12, r. 1). The summons specifies the matters as to which directions are desired (Or. 12, r. 1). The party to whom the summons is addressed shall also make application for an order as to directions as to any interlocutory matter he desires (Or. 12, r. 5). Upon the hearing of the summons, as far as practicable, the Court of Justice must make an order with respect to the following matters:—Pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, examination of witnesses, place and mode of trial. In addition to these other interlocutory applications may be made—that is to say, security for costs of a plaintiff ordinarily resident beyond the Commonwealth (Or. 25, r. 9), the preparation of issues, and where necessary inquiries and accounts (Or. 28, rr. 1, 2), the interim preservation, custody and management of property, the appointment of a receiver, the making of a stop-order (Or. 37, Jud. Act, sec. 16 (b)), applications relating to the conduct of a cause or matter (Jud. Act, sec. 16 (a)), the enlarging or abridging of time (Or. 45, r. 6), the adding of or substitution of parties (Or. 2), and such other applications of a like nature.

NOTICE OF TRIAL.—The pleadings having been closed notice of trial should be given by the plaintiff (Or. 30, r. 6). If the plaintiff fails to give notice within three months after he is first entitled to do so, the defendant may give notice (Or. 30, r. 7). Notice of the trial must be given before entering the action for trial; if the notice be given the action may be entered for trial notwithstanding the pleadings are not closed (Or. 30, r. 10). The entry must be made within six days after notice of trial is given (Or. 30, r. 11). If the plaintiff omits to enter the action for trial, the defendant may enter it for trial (Or. 30, r. 14). The party entering the action for trial is bound to deliver to the proper officer two copies of the whole of the pleadings, if any, for the use of the Justice at the trial (Or. 30, r. 15).

PROCEEDINGS AT THE TRIAL.—When the action is called on if the plaintiff appears, and the defendant does not, then the plaintiff may prove his claim, so far as the burden lies on him (Or. 30, r. 16); if the defendant appears and the plaintiff does not, the defendant is entitled to a judgment dismissing the action

(Or. 30, r. 17). If, however, a judgment be obtained through default of appearance of either party at the trial, the judgment may be set aside (Or. 30, r. 18). The justice has power, however, to adjourn if expedient for the interest of justice (*Ib.*, r. 19).

THE TRIAL.—When all the parties appear at the trial then the action proceeds. In general the testimony at trial of the action is given orally in open Court (H.C.P. Act, sec. 21). The High Court or a Justice may order the examination of a witness on oath orally or on interrogatories before the Court or a Justice or any person (H.C.P. Act, sec. 19), and may also order the particular facts in issue in the action to be proved by affidavit at the trial; but the order shall not be made if any party to the action desires in good faith the attendance at the trial of the proposed witness for cross-examination (H.C.P. Act, sec. 20 (3)). The trial, subject to the *Judiciary Act* and *High Court Procedure Act* and rules made thereunder, proceeds according to the laws relating to procedure evidence and competency of witnesses of the State in which the trial is taking place (Jud. Act, sec. 79; H.C.P. Act, sec. 18).

At the conclusion of the taking of the evidence the Justice may state a case or reserve a question for the consideration of the Full Court or direct any question to be argued before the Full Court (Jud. Act, sec. 18). When the plaintiff at the trial fails to establish by his evidence such a case as to call for an answer from the defendant, the Court may direct judgment of nonsuit to be entered (Or. 30, r. 20), but such judgment shall not have the effect of a judgment on the merits for the defendant (*Ib.*, r. 21). The Justice may at or after the trial direct that judgment be entered for any or either party, or may adjourn the case for further consideration, or may leave any party to move for judgment (Or. 30, r. 22; Or. 33). At every trial, when the officer present at the trial is not the officer by whom judgment ought to be entered, the associate shall enter all such findings of fact as the Justice directs to be entered, and the directions, if any, of the Justice as to judgment, and the certificates, if any, granted by the Justice, in the book kept for the purpose (Or. 30, r. 23). If the Justice directs that any judgment be entered for any party absolutely, then the certificate of the associate to that effect shall be a

sufficient authority to the proper officer to enter judgment accordingly (Or. 30, r. 24). The Court may make such judgments as are necessary for doing complete justice in the action (Jud. Act, sec. 31), and may grant any remedies to which the parties are entitled in respect of any legal or equitable claim brought forward in the action (Jud. Act, sec. 32).

PROCEEDINGS IN CHAMBERS UNDER JUDGMENT. — When judgment has been entered up it may be necessary to make further applications in Chambers in matters of account, payment or transfer of money or securities standing to the credit of an action where there has been a judgment or order declaring rights, or for orders on further consideration and applications of a like nature. These may be made in Chambers (Or. 40). The applications are made on summons (Or. 40, r. 2, *et seq.*).

APPEALS.—The party who has succeeded in obtaining judgment is entitled to execution. This judgment may, however, be appealed from. Appeals to the Full Court from the judgments of Justices of the High Court are by way of re-hearing (Rules of Court, Part II., sec. 1, r. 1), and are instituted by notice of appeal (*Ib.*, r. 2). The notice must be served on all parties directly affected by the appeal (r. 3). The Full Court has all the powers and duties as to amendment and otherwise of the Court appealed from, and has full discretionary power to receive further evidence upon questions of fact, which evidence may be taken either by oral examination in Court, by affidavit, or by deposition before an examiner or commissioner (*Ib.*, r. 9).

On hearing the appeal the Court has power to draw inferences of fact, not inconsistent with the findings of the jury, if any, and to give any judgment which ought to have been given in the first instance, or to make such further order as the case requires. These powers may be exercised by the Court notwithstanding that the notice of appeal is that part only of the decision may be reversed or varied, and such powers may be exercised in favour of all or any of the respondents or parties, although such respondents or parties have not appealed or complained of the decision (r. 10). If the respondent desires to appeal he need not give notice of a cross appeal, but if he desires, at the hearing of an appeal, to contend that the appeal should be varied, then he must

give notice of such intention. His omission to do so does not, however, diminish the powers of the Court when hearing the appeal (r. 11). Every application for a new trial or to set aside a verdict, finding or judgment in an action tried by a Justice without a jury, is by way of appeal to the Full Court (r. 18). When the application is for a new trial, or to set aside a verdict, finding or judgment in an action in which a verdict has been found by a jury, then the application must be made to the Full Court by motion on notice. The notice states the grounds of the application and whether all or part only of the verdict, finding or judgment is complained of (r. 19). Upon the hearing of an application for a new trial or to set aside the verdict or finding of a jury, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, and may for that purpose draw any inference of fact not inconsistent with the findings of the jury, if any; or may, if it is of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and may direct such issues or questions to be tried or determined and such accounts and inquiries to be taken and made as it thinks fit (r. 23). An appeal or motion for a new trial or to set aside a verdict, finding or judgment unless the Court or a Justice so orders, shall not operate to stay proceedings in the action (r. 25).

EXECUTION.—When judgment has been obtained by a successful plaintiff he is entitled to execution, that is, that process of the law by which the judgment or order of the Court is enforced. The judgment in his favor has effect, and may be executed throughout the Commonwealth (Jud. Act, sec. 25). The Court may, for the execution of the judgment, direct the issue of such process as is prescribed by Statute or rule of Court (Jud. Act, sec. 31). The remedies for enforcing a judgment of the High Court in a State are the particular remedies allowed by the laws of the State to persons in whose favor a judgment of the Supreme Court is given in like case (H.C.P. Act, sec. 26). The matter of execution is only to a limited extent dealt with by the Rules of Court. Provision is made for attachment, and for enforcing judgment against partnerships.

ATTACHMENT AND COMMITTAL.—If the plaintiff obtains against the defendant a judgment or order for the payment of money into Court, or for the performance of a judgment, order or writ by which the defendant is required to do any act other than the payment of money, it may be enforced by writ of attachment (Or. 35, r. 1). The writ is directed to the Marshal to arrest and bring before the Court the person against whom it is issued, in order that he may answer an alleged contempt, and perform such order as the Court shall make. The writ cannot issue without leave of the Court or a Justice, to be applied for on notice to the party against whom the attachment is to be issued (Or. 35, r. 4). If the judgment or order require the defendant to abstain from doing any act, it may be enforced by committal to prison (Or. 35, r. 2). An undertaking to do any act other than the payment of money to some person may be enforced by attachment, and an undertaking to abstain from doing an act by committal (Or. 35, r. 3). If the undertaking be not performed, the Court or Justice may, in the first instance, make a peremptory order for the performance of the act undertaken to be done (Or. 35, r. 5). Applications for committal must be made by motion on notice which must be served personally, unless the Court or Justice authorises substituted service (Or. 35, r. 6). The writ of attachment is in many cases a true process of execution. Committal for contempt, where there has been a breach of a judgment or order, is for purposes of punishment only.

EXECUTION AGAINST A FIRM.—If the defendants against whom judgment has been recovered are a firm, then execution may issue—(a) against any property of the partnership within the Commonwealth; (b) against any person who has appeared in the action in his own name, or who has admitted on the pleadings that he is, or who has been adjudged to be a partner; (c) against any person who has been individually served, as a partner, with the writ of summons, and has failed to appear. If the plaintiff claims to be entitled to issue execution against any other person as being a member of the firm, he may apply for leave so to do to the Court or Justice (Or. 36, r. 10).

PROCEEDINGS OTHER than ACTIONS.—The outline of an action has now been given, but not the details for which the rules must be consulted. The rules distinguish between causes and matters. Causes commenced by writ of summons are

called actions. Excluded from the term "action" are some of the civil proceedings on the Crown side. They are those cases in which the subject seeks the Crown's aid by the exercise of the royal prerogative. They are applications for writs of *certiorari*, *mandamus* and prohibition, and for leave to exhibit an information of *quo warranto* (Or. 41). The rules deal also with the procedure for applications for writs of *habeas corpus* (Or. 42).

Causes and matters in the High Court may be commenced by writ of summons, motion, originating summons, or order to show cause. Causes and matters which are by any Act or rules of court required or authorized to be commenced by motion, whether on notice or *ex parte*, or by originating summons, or order to show cause, or in any other specified manner, shall or may, respectively, be so commenced. Except as aforesaid, and except as otherwise provided by any Act, all causes in the Court shall be commenced by writ of summons. When by any Act or Rules of Court any person is authorized to make any application to the Court or a Justice with respect to any matter which is not already the subject-matter of a pending cause or matter, and no other mode of making the application is prescribed by the Act or Rules, the application, if made to the Court, shall be made by motion, and, if made to a Justice, shall be made by originating summons (Or. 1, r. 1).

THE APPELLATE JURISDICTION OF THE HIGH COURT.—Appeal rules have been made dealing with appeals from (1) Justices of the High Court, in Court or in Chambers; (2) from the Judges of the Supreme Courts of the States in the exercise of federal jurisdiction; (3) from the decisions of inferior Courts in the exercise of federal jurisdiction; (4) from the Supreme Courts of the States (Rules of Court, Part II). Appeals from judgments of Justices of the High Court in actions and applications for a new trial have been referred to above. *Ex parte* applications, when refused by a single Justice, may be renewed *ex parte* by way of appeal to the Full Court within the times prescribed (Sec. 1, r. 6). All the provisions regulating appeals from Justices of the High Court apply to appeals to the High Court from judgments of the Judges of the Supreme Courts of the States sitting as Judges of the first instance in the exercise of federal jurisdiction and to applications for new trials or to set aside a verdict, finding or

judgment subject only to necessary modifications with respect to the notice of appeal and the delivery and transmission of documents (Sec. 2). Appeals from the inferior Courts exercising federal jurisdiction must be entered for hearing in the High Court within such times as like appeals to the Supreme Court are required to be entered. The entry shall be made at the Registry at which notices of appeals from decisions of the Judges of the Supreme Court of the State in the exercise of federal jurisdiction are required to be filed and shall be entered in accordance with the practice of the Supreme Court of the State relating to like appeals (Sec. III).

Appeals from the State Supreme Courts are instituted by notice of appeal, served and filed as prescribed, and by giving the prescribed security (Sec. iv., r. 1). This security is fixed at £50 (H.C.P. Act, sec. 35 (3)). Leave or special leave to appeal where required may be given by the High Court on motion *ex parte* (r. 2). Notice of the appeal should be served on all parties directly affected by the appeal (r. 3). If the appeal is of right the notice should be served within twenty-one days from the date of the judgment appealed from; if by leave of the High Court within twenty-one days from the date of the order giving leave to appeal (r. 4). Within this time a copy of the notice of appeal must be filed in the Court from which the appeal is brought (r. 7). Within three months of service of the notice of appeal security for the costs of appeal must be given (r. 10) and the papers are then transmitted to the High Court (r. 11). The appeal must be entered for hearing (r. 12). It is not necessary for respondent to give notice of motion by way of cross-appeal, but if desirous of contending that the decision appealed from should be varied, he may, within the time prescribed, give notice of his intention to so contend. The omission to give such notice shall not diminish the powers of the High Court when hearing the appeal (r. 13). An interlocutory judgment or order from which there has been no appeal shall not operate to prevent the High Court from giving such decision upon the appeal as is just (r. 17). When an appeal has been duly instituted the execution of the judgment appealed from shall be stayed until the party desiring to prosecute it has given sufficient security, to the satisfaction of the Court from which the appeal is brought, to abide the decision of the High Court upon the hearing of the appeal (r. 19).

THE JUDICIARY ACT 1903.

No. 6 of 1903.

to make provision for the Exercise of the Judicial Power (a) of the Commonwealth.

[Assented to 25th August, 1903].

Enacted by the King's Most Excellent Majesty, the Senate, the House of Representatives of the Commonwealth of , as follows:—

Judicial Power.—"The Constitution of the Commonwealth, like United States, and that of the Dominion of Canada, has distributed of government into three great divisions of Executive, Legislative, and to avoid conflict, the functions of each, within its own sphere, must, as ticable, be kept separate and distinct. *Per* Harrison, C.J., in *Re and N. W. Rail. Co.*, 39 Upper Canada Rep., p. 112. The distinction departments, undoubtedly, is that the Legislature makes the law, the enforces, and the Judiciary construes it; *per* Marshall, C.J. (U.S.),

Southard, 10 Wheat. 46; *Cooley*, *Const. Lim.* (5th ed.), 109. The ction is that of hearing and determining questions which arise as to etation of the law and its application to particular cases between declare what the law is or has been is judicial power; to declare aw shall be, is legislative; *Cooley Const. Lim.*, p. 94. "Judicial ans that power with which courts are clothed for the purpose of the etermination of causes; *United States v. Arredondo*, 6 Peters, 691; & *St. L. Railway Co. v. Taylor*, 86 Fed. Rep., 168; the power con- sider a judgment or decree; *Rhode Island v. Massachusetts*, 12 Peters, 's *Federal Procedure*, vol. I., p. 4. The essential nature of the ver and the classes of subjects to which it extends, as well as its th the functions of its co-ordinate legislative and executive depart- e most carefully considered by the Supreme Court of the United e great case of *Georgia v. Stanton*, 6 Wall., p. 50. In that case the orgia commenced a suit in the Supreme Court to obtain an injunction Mr. Stanton, Secretary of War, and others, from carrying into effect eral Statutes commonly known as the Reconstruction Acts. The Court e subject matter of the suit was wholly political, and beyond the domain iary; that it belonged exclusively to the legislative and executive s. The Court refused to acquiesce in the doctrine that every case

involving a decision upon the validity of a Federal Statute was necessarily political; it was only political when it involved the existence *de jure* of a government, or the legality of some act or proceeding purely of an executive and governmental character; *Pomeroy, Const. Law*, p. 624.

But though the distinction between the three departments is broad and fundamental, it is difficult to define their powers exactly. Judicial acts have, of necessity, points of contact with both executive and legislative acts. In Great Britain, owing to the supremacy of the legislative power, the distinction has not been the subject of decision in the Courts, though it is recognised by commentators. In the Commonwealth Constitution, however, each power is vested in distinct organs, and it becomes important to define the principles on which the distinction is based. A similar separation of functions is prescribed in the Constitution of the United States, as well as in the Constitutions of the States of the Union; and, also, though to a less degree, in the Constitution of the Canadian Dominion; *Quick and Garran, Annot. Const.*, p. 720.

Any clear invasion of judicial functions by the executive or by the legislature, or any allotment to the judiciary of executive or legislative functions would be equally unconstitutional. It has been held in the United States that neither the legislative nor the executive branches of the government can constitutionally assign to the judiciary any duties but such as are properly judicial, and to be performed in a judicial manner. Nor can the executive or legislative departments review or sit as a court of error on the judicial acts or opinions of the courts of the United States. (*Baker's Annot. Const. of the U.S.*, p. 121). "Executive power is so intimately connected with the legislative that it is not easy to draw a line of separation; but the grant of the judicial power to the department created for the purpose of exercising it must be regarded as an exclusive grant, covering the whole power, subject only to the limitations which the constitutions impose, and to the incidental exceptions before referred to" (i.e., cases where the exercise of judicial functions by the legislature is warranted by parliamentary usage, and incidental, necessary or proper to the exercise of legislative authority); *Cooly Const. Lim.*, p. 106.

"Whatever be the form in which the jurisdiction of the courts of the United States is invoked, it is essential to the exercise of the jurisdiction that there should be a 'case' before the court, that is, a subject matter of litigation contested by competent parties. It is also essential that the question for decision be judicial in character, for the courts cannot decide political questions, such as whether or not the people of a State have altered their form of government by abolishing an old government and establishing a new one in its place, nor whether or not, in a foreign country, a new government has been established, nor can the courts by injunction restrain a State from the forcible exercise of legislative power over an Indian tribe 'asserting their independence, the right to which the State denies,' nor enjoin the executive department of the government of the United States from carrying into effect acts of Congress alleged to be unconstitutional. *Mississippi v. Johnson*, 4 Wall., 475; *Georgia v. Stanton*, 6 ib., 50. Such questions can only be decided by the political power, 'and when that power has decided, the courts are bound to take notice of its decision and to follow it.' *Luther v. Borden*, 7 How. 147. Upon this principle, the recognition by Congress and the executive of the State governments of the then lately rebellious States as reconstructed after the suppression of the rebellion was held to be binding upon the judicial department of the government. *Texas v. White*, 7 Wall., 700, 701. But the courts may compel the performance of a ministerial and non-discretionary duty by an executive officer, as, for instance, the delivery of a signed and sealed commission to an officer who has been appointed, nominated and confirmed. *Marbury v. Madison*, 1 Cr. 137, or the crediting to a government creditor of a sum of money found by

the Treasury to be due under the express terms of an act of Congress. *Kendall v. Postmaster-Gen. v. Stockton*, 12 Pet. 527." *Paterson, Federal Restraints on State Action*, 211 to 212.

A grant of judicial power does not confer upon the Federal Courts jurisdiction of a suit or proceeding by one State against another State of such a nature that it could not, on settled principles of public and international law, be entered into by the judiciary of the other State. *Wisconsin v. Pelican Ins. Co.*, 127 U.S., 265. Neither the legislative nor the executive branches of the government can constitutionally assign to the judiciary any duties except such as are properly judicial and to be performed in a judicial manner. Note, *Haybourn's Case*, Dall., 411.

EXECUTIVE POWER.—It is not always easy to draw a distinction between executive and Judicial power. It is sometimes difficult to decide whether a particular act is judicial or ministerial. Sometimes the Executive has to perform coercive work as a preliminary to or before, or apart from the decision arrived at by the judicial power—such as service of process and execution of warrants of arrest. Sometimes the coercive work of the Executive consists in carrying out the decisions of the Judiciary, such as the imprisonment or execution of an offender and the enforcement of a warrant of distress. In these instances the coercive interference of the Executive, either as essential preliminaries to or consequences of judicial decisions, frequently necessitates the exercise of Judicial functions and thus renders the distinction between Executive and Judicial duties ambiguous, since executive officers, in so acting, have to interpretate the law in the first instance, and the decisions, after they are given. *Sidgwick's Elements of Politics*, 358. In such cases, where an official has a discretion to act or not to act, according to considerations of expediency, the function is properly regarded as executive. There are, however, some powers undoubtedly Judicial, into the exercise of which considerations of expediency may enter; for instance the power to measure the punishment to be awarded to a convicted criminal. Sometimes the Executive is charged with the review and revision of Judicial decisions in criminal cases. This is done in the exercise of the prerogative of mercy which, in the English system of jurisprudence, is a survival of ancient judicial power formerly vested exclusively in the Crown. The executive power of the national government may be enforced by judicial process; *In re Debs*, 158 U.S., 564; *Myers's Constitutional Cases*, 659.

LEGISLATIVE POWER.—A law which is retrospective or which declares or modifies existing rights may often have the effect of a judicial decision. It is said that that is not legislation which adjudicates in a particular case and which prescribes the rule, contrary to the general, and orders it to be enforced. *Cooley, Const. Lim.* (5th ed.), p. 91. It is the province of legislative power to regulate public concerns and to make laws for the benefit and welfare of the State. Private bill legislation does not conflict with these principles, because such Bills are enacted on petition or by the consent of all concerned, or they forbear to interfere with past transactions and vested rights. *Merrill v. Sherbourne*, 1 New Hampshire, 203; *Cooley, Const. Lim.*, p. 92. That which distinguishes a judicial from a legislative Act is, that whilst one is a determination of what the existing law is in relation to some existing thing already done or happened, the other is a pre-determination of what the law shall be for the regulation of all future cases falling

under its provisions. *Newland v. Marsh*, 19 Illinois, 383; *Cooley, Const. Lim.*, p. 91. *Quick and Garra's Annot. Const.*, pp. 721-2.

POLITICAL QUESTIONS.—The courts cannot decide questions which, in their nature, are not judicial but political. *Luther v. Borden*, 7 How., p. 1; *Georgis v. Stanton*, 6 Wall, p. 50. In *Mississippi v. Johnson*, 4 Wall, 475, the Supreme Court of the United States refused to entertain a bill seeking an injunction to restrain the President from carrying into execution an act of Congress alleged to be unconstitutional. Whether a treaty with a foreign Sovereign has been violated; whether the consideration of a particular stipulation of a treaty has been voluntarily withdrawn by one party so as to be no longer obligatory on the other, and whether the views and acts of a foreign Sovereign, manifested through his representative, have given just occasion to the political departments of government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise, are not judicial questions. The power to determine such questions has not been confided to the judiciary. It has no suitable means to execute its determinations upon such questions. Their determination and execution belong to the executive and legislative departments. *The Chinese Exclusion Case*, 130 U.S. 581-602; *Baker, Annot. Const., U.S.*, p. 133. The question whether power remains in a foreign state to carry out its treaty obligations is in its nature political, and it is not within the province of the Court to interfere with the conclusions of the political department in that regard; *Terlinder v. Ames*, (1901) 184 U.S., 270.

PART I.—PRELIMINARY.

Short title and
Divisions.

1. This Act may be cited as the *Judiciary Act* 1903, and is divided into Parts as follows:—

PART I.—Preliminary, ss. 1-3.

PART II.—Constitu- tion and Seat of the High Court.	}	Justices of the High Court, ss. 4-9. Seat of the High Court, ss. 10-14.
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PART III.—Jurisdic- tion and Powers of the High Court generally.	{	Exercise of Jurisdiction, s. 15.
		Single Justices, ss. 16-18.
		A Full Court, ss. 19-23.
		Enforcement of Process, ss. 24, 25. Costs, ss. 26, 27. Absent Defendants, ss. 28, 29.

PART IV.—Original Jurisdiction of the High Court.	}	ss. 30-33.
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PART V.—Appellate Jurisdiction of the High Court.	}	Appeals, ss. 34, 35. Power of Court, ss. 36, 37.
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PART VI.—Exclusive and Invested Jurisdiction, ss. 38, 39.

PART VII.—Removal of Causes, ss. 40, 46.

PART VIII.—Members and Officers of the High Court.	{	Salaries of Justices, ss. 47, 48. Barristers and Solicitors, ss. 49, 50. Registrars, ss. 51, 52. The Marshal, ss. 53-55.
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PART IX.—Suits by and against the Commonwealth and the States, ss. 56-67.

PART X.—Criminal Jurisdiction.	{	Application of Laws, s. 68. Indictable Offences, ss. 69-71. Appeal, ss. 72-77.
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PART XI.—Supplementary Provisions.	{	Appearance of Parties, s. 78. Application of Laws, ss. 79-81. Venue, ss. 82-85. Rules of Court, ss. 86, 87.
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2. In this Act (a), unless the contrary intention appears— *Interpretation.*

“Suit” (b) includes any action (c) or original proceeding between parties (d);

“Cause” (e) includes any suit, and also includes criminal proceedings (f);

“Matter” (g) includes any proceeding in a Court, whether between parties or not, and also any incidental proceeding in a cause or matter;

“Plaintiff” includes any person (h) seeking any relief against any other person by any form of proceeding in a Court;

“Defendant” includes any person against whom any relief is sought in a matter or who is required to attend the proceedings in a matter as a party thereto;

“The Chief Justice” includes any Justice upon whom the powers and duties of the Chief Justice devolve for the time being;

“Judgment” includes any judgment (i) decree order or sentence;

“Appeal” (j) includes an application for a new trial and any proceeding to review or call in question the proceedings decision or jurisdiction of any Court or Judge.

(a) "**This Act.**"—The definitions in this section are re-enacted by the *High Court Procedure Act*, sec. 2.

(b) "**Suit.**"—"The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him."—Marshall, C.J., *Weston v. City Council of Charleston*, 2 Peter., 449. The question was whether an application for a writ of prohibition was a suit. "In law language a suit is the prosecution of some demand in a court of justice." "To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is to continue that demand."—Marshall, C.J., *Cohens v. Virginia*, 6 Wheaton, 264, cited in *Ex parte Milligan*, 4 Wallace, 2; *Boyd's Const. Cases*, 356.

(c) "**Action.**"—Causes commenced in the High Court by writ of summons are called actions. Or. 1, r. 1.

(d) "**Parties.**"—"Person" or "Party" includes bodies politic or corporate as well as an individual. *Acts Interpretation Act* 1901, sec. 22 (a).

(e) "**Cause.**"—According to Webster, a cause is "a suit or action in court, any legal process which a party institutes to obtain his demand or by which he seeks his right or supposed right." Quoted *Ex parte Milligan*, 4 Wallace, 2; *Boyd's Const. Cases*, 355.

(f) "**Criminal proceeding.**"—"Whenever a statute authorises the imprisonment of an offender against its provisions, whether it be the primary punishment of the offence or punishment in the last resort, the proceeding against him must be regarded as a criminal proceeding." *Per* Lutwyche, J., *Reg. v. White*, (1860) 1 S.C.R.Q., 11. What is a criminal proceeding is determined really as a question of procedure. An assault may be the subject of a criminal procedure as by indictment, or the subject matter of an action. "The question is not whether the proceeding must, but whether it may end in imprisonment."—*Per* Esher, M.R., *Seaman v. Burley*, 1896, 2 Q.B. at 347. Cf. also *Derby Corporation v. Derbyshire County Council*, 1897, A.C. 552. See also, *Stroud's Judicial Dictionary* definition "criminal cause," and Ann. Prac. notes to sec. 47, *Judicature Act* 1873.

(g) "**Matter.**"—Compare the term matter in Const., secs. 75, 76, and notes thereon in *Quick and Garran Annot. Const.*, p. 765. As to how causes and matters are commenced in the High Court, see Or. 1, r. 1.

(h) "**Person.**"—Definition of, see note "parties," *supra*.

(i) "**Judgment.**"—A judgment is the conclusion of a Court declaring the rights or remedies to be recognised or awarded between the parties upon facts found by the Court or jury or admitted by the parties (*e.g.*, on demurrer) or upon their default in the course of proceedings instituted for the redress of a legal injury. *Encyclopedia of Law*, vol. 7, p. 114. A judgment is the sentence of the law pronounced by the Court upon the matter contained in the record. An "order," as contrasted with a judgment, is a judicial or ministerial direction or conclusion on matters outside the record. (*Stroud's Judicial Dictionary* sub. tit. "Judgment" and "Order").

Under the former practice of the English Superior Courts, the word judgment was usually applied to decisions of the Courts of Common Law, the word

"decree" being generally used in the Courts of Chancery (*Quick and Garran, Annot. Const.*, p. 741.) In Courts of record having criminal jurisdiction, the final adjudication of the Court is termed the judgment, and in it is included the sentence. Judgments may be either interlocutory, i.e., given upon some intermediate proceeding and not finally determining or completing the suit or action; or final i.e., putting an end to the suit or action by awarding or refusing redress.

"Decree" is the word generally used as equivalent to judgment in Courts of equitable jurisdiction, and other jurisdictions where the procedure of Courts of Equity is adopted. Like a judgment a decree may be either final or interlocutory.

"Order" generally speaking, means any direction or command of a Court; but it is commonly used in opposition to judgment or decree to describe orders on interlocutory applications. "A 'judgment' is a decision obtained in an action, and every other decision is an order."—*Per Esher, M.R., Onslow v. Commissioners of Inland Revenue*, 25 Q.B.D. 466.

"Sentence" means a definite judgment pronounced in a cause or criminal proceeding (*Wharton's Law Lexicon*). It is most commonly used in connection with criminal proceedings.

The four words taken together are wide enough to include every judicial decision, final or interlocutory, in every jurisdiction, civil or criminal, *see Quick and Garran, Annot. Const.*, p. 741.

(j) "**Appeal.**"—See note to sec. 39 (b) "Wherever an appeal lies."

3. The Claims against the Commonwealth Act 1902 (a) is hereby repealed. Repeal of Act No. 21 of 1902.

(a) This Act was passed temporarily to invest the State Courts with power to entertain actions in contract or tort against the Commonwealth. Prior to passing of this Act it was held, *per Pring, J.*, in New South Wales, that the State Courts had no jurisdiction to entertain such actions. *Hannah v. Drake* (1902), 8 A.L.R. (C.N.), 69.

PART II.—CONSTITUTION AND SEAT OF THE HIGH COURT.

Justices of the High Court.

4. The High Court shall be a superior court of record (a), Judges, and shall consist (b) of the Chief Justice and two other Justices, who shall respectively be appointed by commission (c).

(a) "**Superior court of record.**"—A Court of record is one which has been ranked as such from time immemorial, or has been made such by the express provisions of some Act of Parliament.—*Stephens*, III., 299, 13th ed. The Superior Courts of Law in England, prior to the *Judicature Act* (1873), 36 & 37 Vict. c. 66, were the Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer. By that Act those ancient Courts ceased to exist, and they were reproduced under the designations of Divisions of the High Court of Justice.—*Broom's Commentaries*, p. 42-3. That High Court is described by the Act, sec.

16, as a "Superior Court of Record," words which have been used in the above section of the *Judiciary Act* to describe the rank and status of the High Court of Australia.

A Court of Record is, at Common Law, one whose judgments, orders and proceedings are enrolled for perpetual memorial and testimony, and whose records are absolutely incontestible; it is distinguished from Courts not of record which are of inferior dignity and the acts and proceedings of which must, like other facts, be proved in every case. The distinction originated in the theory that the Superior Courts were the Courts of the Sovereign, in which the Sovereign was actually present, or specially represented, and that what the Sovereign states to have occurred in his own special Court must be treated as authoritative and unchallengeable, and that nothing could be averred against a record nor any plea or proof allowed to the contrary. —Co. Litt., 260. (*Stephen's Commentaries*, 13th ed., vol. III., 299).

A Court of Record can, however, at any time correct clerical mistakes and other accidental slips or omissions in its judgments and orders. Such a Court may also rectify and amend orders which do not properly express the decisions on which they are founded. "I cannot doubt," said Lord Penzance, in *Laurie v. Lees*, 7 App. Cases, 34, "that under the original powers of the Court, quite independent of any order that is made under the *Judicature Act*, every Court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the Court—to vary them in such a way as to carry out its own meaning; and, where language has been used which is doubtful, to make it plain. I think that power is inherent in every Court." See also *Re Swire*, 30 Ch. Div., 248. "When an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce. The correction ought to be made upon motion to that effect, and is not matter either for appeal or for re-hearing," *per* Lord Watson in *Hatton v. Harris*, (1892) App. Cases, p. 560.

The Superior Courts of Record in England were, by immemorial usage, competent to issue writs of attachment for contempt; *Miller v. Knox* (1838), 4 Bing. N.C. 574. So deeply was this power associated with the status of a Court of Record that it has been held the very creation of a Court of new jurisdiction, with power to fine and imprison for contempt, makes it a Court of Record, 3 Broom & Hadley's Comm. 21; *Grenville v. Col. of Phys.*, 12 Mod. R., 386.

But although the High Court is declared by the *Judiciary Act* to be a Superior Court of Record it must be noted that such declaration is not intended to confer jurisdiction; it is merely a titular distinction. The power to commit for contempt is expressly conferred by a subsequent section, so that it does not depend on any inference arising from the creation of a Court of Record. It is doubtful whether the declaration does more than confer rank and status on the High Court of Australia, and render its records as authoritative and incontestable as those of the High Court of England.

The Federal Parliament has no authority to confer jurisdiction on the High Court beyond that delineated by the Constitution, secs. 73, 75, 76, 77 and 78. By

sec. 51, xxxix., it is empowered to legislate in matters incidental to the execution of the judicial power; this does not permit it to grant additional jurisdiction to the High Court, but merely to clothe it with such authority as may be necessary to enable it to exercise the judicial power assigned to it. The High Court is not a Common Law Court; it is the creature of statute. When a Court draws its power from the common law it possesses all the functions which were held by the co-ordinate Courts in England, except so far as those attributes have been limited or taken away by positive legislation. On the other hand those Courts which draw their powers from constitutional instruments and statutes passed thereunder possess those functions alone which have been expressly conferred; they cannot aid, or enlarge their authority by appealing to the unwritten law behind the Constitution, except so far as there may be necessary implications. The High Court is not clothed with common law jurisdiction. It derives all its power from the Constitution, and laws passed by Parliament in pursuance thereof; it is bound by the express grants contained in the organic law and in positive legislation. The limits of its authority are therefore fixed; Parliament may perhaps fail to come up to those boundaries; it cannot pass beyond them—*Pomeroy, Const. Law*, p. 619.

The guarded way in which the *Judiciary Act* proceeds to assign jurisdiction to the High Court, by specific grants, instead of in general terms, may be contrasted with the language in which the Supreme Courts of the States were originally created by Imperial Charters and Statutes, and by Colonial Acts passed thereunder. By the Act, 9 Geo. IV., c. 83 (1828), the Supreme Court of New South Wales and the Supreme Court of Van Diemen's Land were created. It was provided that they should be Courts of Record, and that they should have cognizance of pleas civil, criminal, or mixed, and jurisdiction in all cases whatsoever as fully and amply in New South Wales and Van Diemen's Land respectively, as His Majesty's Courts of King's Bench, Common Pleas, and Exchequer at Westminster, and "the said Courts shall be Courts of oyer and terminer, and gaol delivery, and the judges shall have the jurisdiction and authority in New South Wales and Van Diemen's Land respectively, as the judges of the Courts of the King's Bench, Common Pleas, and Exchequer in England, as shall be necessary for carrying into effect the several jurisdictions, powers and authorities committed to the said Courts respectively." It was further declared that the said Supreme Courts should be Courts of Equity having the same authority and jurisdiction as the Lord High Chancellor of Great Britain, acting lawfully within the realms of England. Compare also Act 15 Vic., No. 10, passed by the Legislature of Victoria pursuant to authority conferred by the Imperial Statute, 13 and 14 Vic., c. 59. By that Act the Supreme Court of Victoria was established. By sec. 10 of the Act it was provided "That the said Court shall have cognizance of all civil pleas, and shall have jurisdiction within the said Colony of Victoria and its dependencies, to hear and determine all actions whatsoever, real, personal, and mixed, as fully and amply, to all intents and purposes, as Her Majesty's Courts of Queen's Bench, Common Pleas, and Exchequer of Pleas at Westminster, or either of them lawfully have or hath in England." By sec. 11 it was further enacted "That the said Court shall have jurisdiction to enquire of, hear and determine within the said Colony of Victoria and its dependencies, all treasons, felonies, misdemeanors, and offences of what nature or kind soever, and wheresoever committed, which can or may be enquired of, heard and determined in Her

Majesty's Court of Queen's Bench at Westminster, or in the Central Criminal Court in London."

This section conferred on the Supreme Court of Victoria a general jurisdiction both civil and criminal in all cases whatsoever arising in the Colony, and in dealing with those cases the Court was clothed with all the powers of the Superior Courts of England. No such words are used in the Constitution creating the High Court, or in the *Judiciary Act* by which it has been organized. Its jurisdiction is limited by the express grants; what is not granted to it expressly, or by necessary implication is denied to it.

(b) "**Shall consist of.**"—The Constitution, sec. 71, provides that "the High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes." The constitutional minimum number of Justices is therefore three. Parliament might have prescribed a greater number, but in view of the limited amount of original jurisdiction assigned to the High Court it has not been deemed necessary to appoint more than the constitutional minimum. The *Judiciary Act*, sec. 49, fixes the salary of the Chief Justice at the rate of £3,500 per year, and of each other Justice at the rate of £3,000 per year. Each Justice is entitled to an allowance to cover expenses incurred whilst travelling in the discharge of the duties of his office. No provision is made for payment of pensions on retirement.

(c) "**Appointed by commission.**"—The Constitution Act, sec. 72—1., provides that the Justices of the High Court shall be appointed by the Governor-General in Council; it does not prescribe any particular mode of appointment. One of the former methods of appointing colonial judges in the exercise of statutory authority was by letters patent.—*Today's Parl. Gov. in Col.*, 2nd ed., p. 829. In some statutes the appointment of judges is referred to as being made by commission.

Letters patent have been described as letters of the Sovereign open, and sealed below with the Great Seal of England, conferring on a person some office, honour, privilege, or dignity. But now, by the *Crown Office Act* 1877, 40 & 41 Vict. c. 41 s. 4, and Orders in Council thereunder, the Wafer Great Seal may be used in many cases instead of a waxen seal. Letters patent for inventions are sealed with the seal of the Patent Office—46 & 47 Vict. c. 57 s. 12. Letters patent, or overt, are so called from the circumstance that they are open, having the seal affixed and ready to be exhibited. Reciting the name and title of the Sovereign they are addressed: "To All to Whom these Presents shall come, Greeting." The concluding part runs—"In testimony whereof we have caused these our letters to be made patent and the Seal of our . . . to be hereunto affixed. Witness Our Trusty and Well-beloved, &c., &c." (L.S.).

A Royal Commission is a modified form of letters patent, having many of the features and the same effect as letters patent. A Commission is drawn in the name of the Sovereign, and addressed to the person intended to be honoured thus—"To our Trusty and Well Beloved, &c., Greeting." A Commission frequently concludes in the form as a letters patent except that in England it is sealed with the Sign Manual and Signet. In the Commonwealth letters patent and commissions are sealed with the Great Seal of the Commonwealth.

Letters patent and Commissions have been the usual methods in which the Crown has, during many centuries, made grants of dignities and offices, and

delegated its judicial power to judges and justices. Among the latter may be mentioned the commission of oyer and terminer and gaol delivery, and the commission of the peace under which justices sit in Quarter Session. In some cases great offices such as the office of the Governor of a Colony has been constituted and organized by letters patent under the Great Seal, whilst individual appointments to hold the office have been made by commission under the Royal Sign Manual and Signet. There does not appear to be any substantial difference between appointments by letters patent and appointments by commission except that in England one is passed under the Great Seal and the other under the Royal Sign Manual and Signet.

The following is the text of the commission appointing the Chief Justice of the High Court :—

COMMONWEALTH OF AUSTRALIA.

His Excellency the Right Honorable Hallam, Baron Tennyson, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Governor-General and Commander-in-Chief of the Commonwealth of Australia :

To the Right Honorable Sir Samuel Walker Griffith, a member of His Majesty's Most Honourable Privy Council, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George :

GREETING—

Know you that confiding in your loyalty, integrity and ability I, Hallam, Baron Tennyson, the Governor-General aforesaid, acting with the advice of the Federal Executive Council, in pursuance of the Constitution of the Commonwealth of Australia, do hereby appoint you the said Samuel Walker Griffith to be Chief Justice of the High Court of Australia : to have hold exercise and enjoy the said office and the rights and privileges appertaining thereto subject to the Constitution and the laws of the Commonwealth.

(L.S.) Given at Melbourne under my hand and the Great Seal of the Commonwealth of Australia, this fifth day of October, in the year of our Lord One thousand nine hundred and three and in the third year of His Majesty's reign.

(Signed) TENNYSON.

By His Excellency's Command.

(Signed) ALFRED DEAKIN.

Entered on record by me in the Register of Patents, No. 1, p. 173, this fifth day of October, one thousand nine hundred and three.

It is a settled principle of constitutional law that though the Crown could at one time by virtue of its prerogative, establish Courts and appoint judges to proceed according to common law, it cannot now create any new Court or appoint any judges except as authorized by statute.—*Re The Bishop of Natal*, 3 Moo., P.C. (N.S.) 115. The erection of a new Court with a new jurisdiction cannot be effected without an Act of Parliament.—*Coke*, 4th Inst.

With respect to tenure, the Constitution, sec. 72, makes no definite provision, but sub-sec. II. declares that the Justices "shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour

or incapacity." This clearly shows that the tenure is during good behaviour with special restrictions as to the mode by which misbehaviour or incapacity is to be proved and adjudicated on. The legal effect of the grant of an office during good behaviour is the creation of an estate for life in the office. Such an estate is terminable only by the holder's incapacity from mental or bodily infirmity, or by his breach of good behaviour.—*Todd's Parl. Gov. in Eng.*, Vol. II., 2nd ed., p. 857.

As early as Lord Coke's time, the Barons of the Exchequer were appointed during good behaviour, and at the Restoration of Charles II. the Commissions of the Common Law Judges were in this form but there was no statutory restriction on the Crown's pleasure until 1700, when the Act of Settlement (12 & 13 Will. III., c. 2) provided that "the judges' commissions be made *quam diu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of the Parliament it may be lawful to remove them." In 1760, by the Act 1 Geo. III., c. 23, it was further provided that judges' commissions should continue notwithstanding the demise of the Crown, and their salaries were secured to them during the continuance of their commissions. These enactments for securing the dignity and independence of the Bench, form the basis of the constitutional provisions to a similar effect throughout the British Empire.—*Quick and Garran Annot. Const.*, p. 728.

In the Australian colonies and in the Dominion of Canada, the Judges of the Superior Courts hold their offices during good behaviour, but they may be removed by the Crown for misbehaviour, whilst without any technical proof of misbehaviour they may be removed by the Crown upon an address from both Houses of the Colonial Legislature under the laws of which they have been appointed. The Constitutions of the Australian colonies provide for the removal of the Judges "by Her Majesty" in the before mentioned cases; the Governor and Executive of the colony have no decision at all. This practically means the reservation of the final power of removal to the Imperial Government acting on the advice of the Privy Council. The difficulties associated with any attempt to remove a colonial judge, whose removal must be confirmed by express reference to the Imperial Government, are illustrated by the numerous unsuccessful efforts made by the Legislature and the Government of South Australia to remove Mr. Justice Boothby, a puisne judge of that Province.—*Todd's Parl. Gov. in Col.*, 2nd ed., p. 846. Under the Constitution of the Commonwealth, following that of the *British North America Act*, sec. 99, the Judges of the High Court are removable by the Governor-General in Council on an address by both Houses. It has been argued in Canada that as the appointment of Judges begins there with the Governor-General and not with the Sovereign, it also ends with the Governor-General, and that the right of appeal to the Crown and Council is excluded.—*Todd's Parl. Gov. in Col.*, 2nd ed., p. 835. This contention seems greatly strengthened under the Constitution of the Commonwealth by the use of the words "Governor-General in Council," which makes the decision that of the Federal Executive; here the responsibility is thrown on the Federal Executive, and in the absence of provision for appeal it would appear that its decision is final. The case, in fact, is closely analogous to the removal of a British judge by the Crown on an address from both Houses of the Imperial Parliament.

The provisions of the Constitution as to the address from both Houses differ from those of the Act of Settlement, the *British North America Act*, and the

Australian Colonial Constitutions; it requires that the address must pray for removal on the ground of "proved misbehaviour, or incapacity." The action of Parliament is limited by the requirement of proof of definite charges. The liability to removal only arises when the condition of the tenure is broken. Though the procedure and mode of proof are left entirely to the Houses of Parliament to determine, it would seem that inasmuch as proof is expressly required the duty of each House is indistinguishable from one of a strictly judicial character. Even under the Act of Settlement it has been recognized that the procedure in Parliament to vote an address for the removal of a Judge ought to be conducted on strictly judicial lines. It has been laid down that no address for the removal of a judge ought to be adopted by either House except after the fullest and fairest enquiry into the matter of complaint by the whole House or by a Committee of the whole House.—*Todd's Parl. Gov. in Eng.*, vol. 2, pp. 860, 875. The substantial distinction between the ordinary tenure of British judges and the tenure established by the Commonwealth Constitution is that the ordinary tenure is determinable on two conditions, either (1) misbehaviour, or (2) an address from both Houses; whilst under this Constitution the tenure is only determinable on one condition—that of misbehaviour or incapacity—and the address from both Houses is prescribed as the only method by which forfeiture for breach of the condition may be ascertained.—*Quick and Garran's Annot. Const.*, p. 731.

5. The qualification (a) of a Justice of the High Court shall be as follows:—He must either be or have been a Judge of the Supreme Court of a State, or be or have been a practising barrister or solicitor of the High Court or of the Supreme Court of a State of not less than five years' standing.

Qualification of
Justices.
(N.S.W.)

(a) "**Qualification of a Justice.**"—"For the due exercise of the great prerogative of which they are thus the guardians, the judges are surrounded with various securities. The first of these relates to their qualification. The Judges must be members of the legal profession. The Common Law Judges were until recently called to the degree of sergeant-at-law, a condition which insured to the Judge the *viginti annorum lucubrationes* that the dictum of Fortescue requires. For the Judicial offices of statutory origin the Acts of Parliament under which they are respectively created usually specify some minimum amount of forensic standing."—*Hearn's Gov. of Eng.*, p. 78.

6. The Justices other than the Chief Justice shall have seniority according to the dates of their commissions, or when the commissions of two or more of them bear the same date according to the precedence (a) assigned to them by their commissions, or failing such assignment according to the order of their being sworn.

Seniority.
U.S. 674.

(a) "**Precedence.**"—In the early Judiciary Acts of some of the Australian colonies provision was made to the effect that until the pleasure of the Crown be made known the Chief Justice of the Supreme Court of the colony (now State) shall have rank and precedence above and before all persons whomsoever within the colony (now State) excepting the Governor and Lieutenant-Governor thereof

and except all such persons as by law or usage take place in England before the Lord Chief Justice of England. Supreme Court of Victoria Act (6th Jan., 1852). 15 Vict. No. 10. This is a recognition of the prerogative of the Crown, coupled with a temporary declaration to be operative until displaced by a legal exercise of the prerogative defining the rank and precedence of the Chief Justice of the State.

As a general rule all matters relating to titular distinctions, honors, rank and precedence belong to the prerogatives of the Crown. The Crown is said to be the source and fountain of all honors and dignities. The Sovereign has undoubted right, by virtue of his prerogative, to give style, title, dignity and precedence in all parts of his Dominions.—*Todd's Parl. Gov. in Col.*, 2nd ed., 313. This, like other branches of the prerogative, can only be taken away by express legislation with the concurrence of the Crown. It has not been abdicated or renounced in Canada by the passing of the *British North America Act* 1867, nor, in Australia, by the passing of the *Constitution of the Commonwealth Act* 1900. As a general rule Imperial honors in the colonies emanate directly from the Crown upon the advice of the Governor of the colony and Imperial Ministers, but not on the recommendation of colonial Executives.—*Walrond, Letters of Lord Elgin* (1833), p. 114; *Todd's Parl. Gov. in Col.*, 2nd ed., p. 315. This principle has been generally recognized in the exercise of this branch of the prerogative in the colonies. Rules and regulations in regard to honors and tables of precedence and decisions to determine controverted questions arising out of the same, are communicated to colonial Governors by His Majesty's Secretary of State for the Colonies.—*Todd, id.*, p. 316.

The Crown in its capacity as part of the Constitution of a State can, under the new Federal system of Australia, exercise its prerogative to determine the rank and precedence *inter se* of State Judges and States Officers. The Crown in its capacity as part of the Commonwealth, or Federal Government, can exercise its prerogative to determine the rank and precedence, *inter se*, of Federal Judges and Officers. In its capacity as the central authority of the Empire, the Crown, regarding the people and governing agencies of Australia as one political community, can determine the rank and precedence *inter se* of Federal and State Judges and Officers, so as to harmonize conflicting claims and establish in Australia, as it has done in Canada, a uniform rule of gradation in rank and precedence operative throughout the Commonwealth.

Vacancy of office
of Chief Justice.
U.S. 675.

7. (1) In case of the absence (α) of the Chief Justice from the Commonwealth, or of his inability to perform the duties of his office, all the duties and powers of the Chief Justice shall, during such absence or inability, devolve upon the senior Justice.

(2) In case of the absence from the Commonwealth or inability of any Justice upon whom such powers and duties devolve, they shall during such absence or inability devolve upon the Justice who is next in seniority.

(a) "**Absence.**"—By the Imperial Statute, 22 Geo. III., c. 75, it was provided that if any person holding an office granted by Patent from the Crown shall be wilfully absent from the Colony wherein the same ought to be exercised

without a reasonable cause to be allowed by the Governor and Council of the Colony, it shall be lawful for such Governor and Council to amove such person from office; but any person aggrieved by such a decision may appeal to His Majesty in Council. The Statute is still in force and it has been repeatedly decided by the Privy Council that it extends to Colonial Judges.—*Todd's Parl. Gov. of Col.*, 2nd ed., p. 828.

By the Act of the Victorian Legislative Council, 15 Vict., No. 10, constituting the Supreme Court of Victoria, it was in sec. 5 declared that "it shall be lawful for the Lieutenant Governor, with the advice of the Executive Council, to suspend from his office until the pleasure of Her Majesty be known any judge of the Supreme Court who shall be wilfully absent from the Colony without a reasonable cause to be allowed by the Lieutenant Governor and Executive Council." The Imperial Acts, 18 & 19 Vict., c. 54, and 18 & 19 Vict., c. 55, established new Constitutions in and for the Colonies of New South Wales and Victoria respectively. Sec. 38 of each Constitution enacted that "the Commissions of the Judges shall continue and remain in force during their good behaviour." "It shall be lawful, nevertheless, for Her Majesty, Her heirs, or successors to remove any such judge or judges upon the address of both Houses of the Legislature of the Colony." The Constitution of Queensland (Order of Council, 6th June, 1859) contained a section similar to that in the Constitution of New South Wales. In this state of the law the following precedents occurred:—

In 1862 a case arose in Queensland involving the question as to the power of the Governor-in-Council to suspend a judge; there was no local law in Queensland similar to 15 Vict., No. 10, which was in operation in Victoria; the matter was referred to the Imperial Law Officers (Sir William Atherton and Sir R. Palmer). They reported to the Secretary of State for the Colonies that in their opinion the Imperial Act, 22 Geo. III., c. 75, was applicable to Queensland and that there was no constitutional reason why, in a Colony where parliamentary or responsible Government is established, the power conferred by that Act might not be continued to be exercised by the local Executive together with the power of removal upon a parliamentary address. In the absence of a local Act authorizing suspension for wilful absence, the law officers did not think that the Governor had any power either with or without the advice of the Executive Council to suspend a judge, as distinguished from removing him under the power conferred by 22 Geo. III., c. 75 (*Ib.*, p. 843). It should be stated, however, that the judge of Queensland had been appointed by Patent.

In January, 1864, Sir Redmond Barry, one of the Judges of the Supreme Court of Victoria, desiring a short holiday informed the Governor (Sir Charles Darling) of his intention to leave the colony for a short period, but he did not formally ask leave of absence. The Governor referred the matter to the Attorney-General (Mr. G. Higinbotham) for his advice as to whether this procedure was legally correct. The Attorney General reported that judges had no right to act thus; that leave should not be taken but should be allowed pursuant to the Colonial Act, 15 Vict., No. 10, sec. 5. This opinion was afterwards communicated to Mr. Justice Barry by the Attorney General together with the minute of the Executive Council allowing him leave of absence. Mr. Justice Barry wrote to the Governor stating that he did not consider it necessary to obtain leave of absence before leaving the Colony; that since the passing of the *Constitution Act* the

position of Supreme Court judges had been altered; that under that Act the judge was appointed during good behaviour and was removable only upon the address of both Houses of the Legislature; he denied the right of the Executive Council to call in question his judicial conduct. Subsequently the Chief Justice (Sir W. Stawell) transmitted to the Attorney General, to be forwarded by the Governor to the Colonial Secretary, a petition to the Queen signed by the judges of the Supreme Court praying that the question whether as regards the said judges the Imperial Act, 22 Geo. III., and the Colonial Act, 15 Vict., No. 10, aforesaid, were still in force, might be submitted to the Privy Council to be heard and determined. The Secretary of State for the Colonies (Mr. Cardwell) referred the petition to the Law Officers of the Crown (Sir R. Palmer and Sir R. P. Collier). On 10th January, 1866, the Law Officers advised "that notwithstanding the passing of the *Constitution Act* (18 & 19 Vict., c. 55), the Governor and Council can still 'amove' judges under the Imperial Statute, 22 Geo. III., c. 75, and that the Governor and Council probably retain the power of suspending Judges under the local Act." *Todd's Parl. Gov. in Col.*, 2nd ed., p. 843. After confirming the opinion of their predecessors in the Queensland case, the Law Officers proceeded "We also think it is the better opinion, that they can still suspend Judges under the local Act, 15 Vict., No. 10, sec. 5, the power of suspension, for the causes therein mentioned, being not inconsistent with the tenure of the office during good behaviour, especially if the office is (as we consider it to be) held subject to the power of amotion, for the like causes, given by the 22 Geo. III., c. 75."—*Id.*

The Judicial Committee of the Privy Council did not entertain the petition of the Judges. The President of the Council decided "that on grounds both of previous practice and of principle, it was inexpedient to comply with the Judges' application. The question raised by the Judges is as yet entirely of an abstract and theoretical character, and it appears to the Lord President to be highly inconvenient to call upon a Court of Appeal—such as the Judicial Committee of the Privy Council is, in relation to the Colonies—to decide abstract questions of law, so that whenever a case actually arises for the application of the law it should be pre-determined."—*Todd's Parl. Gov. in Col.*, 2nd ed., p. 843.

In March, 1897, a memorandum on the tenure of office of the Judges of the Supreme Court of Queensland was presented by all the Judges of the Supreme Court of Queensland to the Government. It contains a review of the cases and the Statutes, and concludes:—" (1) that the judges of Queensland, not being appointed by patent, do not fall within the terms of the Act 22 Geo. III., c. 75; (2) that if they do, a power of removal for absence not amounting to misbehaviour is inconsistent with the tenure of their office, and is therefore abrogated; and (3) that the power of removal for what appears to the Governor in Council to be misbehaviour—is also inconsistent with that tenure." The Statute 22 Geo. III., c. 75, has no application to the Justices of the High Court. Their tenure and their removal are the subject of the express terms of the Constitution.

Justices not to
hold other office

8. A Justice of the High Court shall not be capable of accepting or holding any other office or any other place of profit (a) within the Commonwealth, except any such judicial office (b) as

may be conferred upon him by or under any law of the Commonwealth.

(a) "**Any other office or place of profit.**"—A Justice of the High Court cannot hold any other office or any other place of profit within the Commonwealth; that is he cannot hold any other office or place, public or private, to which a salary or remuneration is annexed. The prohibition applies to an office of profit as well as to a place of profit. One consequence of this section, combined with the Constitution, sec. 4, is that a Justice of the High Court could not accept the office of Administrator of the Government of the Commonwealth. Honorary and unpaid offices and other judicial offices within the gift of the Federal Government are exceptions to the prohibition. A Justice would not, by acceptance of a prohibited position, *ipso facto* forfeit his office, but his conduct in doing so would probably be "proved misbehaviour" warranting an address from both Houses praying for his removal. As to what constitutes an office or place of profit under the Crown, see *Rogers on Elections*, vol. II., pp. 8, 25; *Bowman v. Hood* (1899), 9 Q.L.J., 272.

(b) "**Judicial Office.**"—The Constitution, sec. 71, states that "the Judicial Power of the Commonwealth shall be vested in the High Court and in any such other Federal Courts as the Parliament may create;" sec. 72 prescribes the tenure and security of salaries of Justices of the High Court and of other Courts created by the Parliament. The *Judiciary Act*, sec. 8, whilst disqualifying a Justice of the High Court from accepting, or holding any other office of profit excepts from the disqualification any such judicial office as may be conferred on him by any law of the Commonwealth; this suggests the question whether any judicial power can be exercised except by Courts constituted as required by the Constitution, sec. 72. There may be a certain amount of judicial power interwoven with some offices which are not of the same high degree as those held by Justices of the High Court. In the United States such subordinate judicial positions are occupied by officers who are not within the protection of the Constitution, as regards salary and tenure, such as members of the Inter-State Commission and members of Courts Martial. It is considered by some authorities that the Constitution in securing the tenure and salaries of Justices of the Supreme Court "and other Courts," refer to Judges who exercise all the regular and permanent duties belonging to a Court in the ordinary popular signification of the term—*Sergeant "On The Constitution"*—cited *Story* 1634 (n.). Public Service Commissioners, Boards of Enquiry, and Officers who may perform functions partly judicial and partly ministerial are not "Courts" within the meaning of the Constitution.

The same may be said of Courts Martial appointed to administer military law applicable to the defence forces of the Commonwealth. The Inter-State Commission when appointed will be a judicial tribunal exercising judicial functions of an important character, but the salaries and tenure of its members are determined by the Constitution, sec. 103.—*Harrison Moore's Const. of the Commonwealth*, p. 281. The Court of Conciliation and Arbitration Bill 1903 provided for the exercise of important judicial functions and that its President must be a Justice of the High Court; its other members might be laymen whose salaries and term of office were the subject of separate provision.

Oath or affirmation of allegiance and of office.
31 & 32 Vict.
c. 72 s. 4.

9. Every Justice of the High Court shall before proceeding to discharge the duties of his office take an oath (a) or affirmation of allegiance in the form in the Schedule to the Constitution, and also an oath or affirmation in the form following :—

I A.B. do swear that I will well and truly serve our Sovereign Lord the King in the office of a Justice of the High Court of Australia and I will do right to all manner of people according to law without fear or favour affection or ill-will: So help me GOD.

Or I A.B. do solemnly and sincerely promise and declare that (*l.c. as above, except the words "So help me GOD"*).

(a) "**Oath.**"—In English law various provisions have from time to time been made to secure and protect the Judges against the influences of the Crown and those in high places. "The first is the prohibition of the interference of the Crown under any of its seals with the due course of justice. The second is the oath of the Judges as settled by Statute. The third is the permanence given to the tenure and the salaries of the Judges by the Act of Settlement. The fourth is the amendment of these provisions of the Act of Settlement at the commencement of the reign of George III."—*Hearn's Gov. of Eng.*, p. 80. "In the reign of Edward III. several other attempts were made to secure the better administration of justice. Among them was the regulation of the judicial oath. It was provided that the Judges shall swear that they will not receive any fee or present except meat or drink of very small value; that they will not take robes from anyone except the King, or give counsel when the King is party, and further that they will not regard any letter or message from the King with relation to any point depending before them."—*Ib.*, p. 80.

Seat of the High Court.

Seat of the High Court.

10. The principal seat (a) of the High Court shall be at the seat of Government. Until the seat of Government is established the principal seat of the High Court shall be at such place as the Governor-General from time to time appoints.

(a) "**Seat.**"—As to the seat of Government, see Const., sec. 125; as to Principal Registry at the principal seat of the Court, see sec. 11, *infra*; as to sittings of the High Court at the principal seat, see sec. 12, *infra*.

The Governor-General with the advice of the Federal Executive Council has ordered and declared that until the seat of Government is established or until otherwise ordered the principal seat of the High Court shall be in Melbourne and the Principal Registry of the High Court shall be at the Supreme Court House, Melbourne. *Commonwealth Gazette*, 3rd Oct., 1903, p. 626.

11. (1) There shall be a Principal Registry (a) of the High Registries.
Court, which shall be at the principal seat of the Court.

(2) There shall also be a District Registry of the High Court in every State except the State in which the principal seat of the Court is situated. Such District Registry shall be at the seat of Government of the State.

(3) The Governor-General may on the recommendation of the Justices of the High Court, or a majority of them of whom the Chief Justice is one, establish District Registries at other places within any State or Territory.

(a) "**Registry.**"—Compare this section with the *Judicature Act 1873*, sec. 60, *et seq.*, and the practice thereunder. *Chitty's Archbold*, 14th ed., p. 1,421; compare also the organisation of the Supreme Court of Queensland under the Supreme Court Acts 1867 to 1895. As to the sittings of the High Court at the Principal Seat, and at each place where there is a Registry, see sec. 12, *infra*; as to proceedings in District Registries, see H.C.P. Act, sec. 6; as to transfer of causes from one Registry to another, see *ib.* sec. 7, *et seq.*

12. Sittings (a) of the High Court shall be held from time to Place of sitting.
time as may be required at the principal seat of the Court and at each place at which there is a District Registry.

(a) "**Sittings.**"—As to matter heard at one place being dealt with at another, see sec. 13, *infra*; as to power of Court to make rules regulating the sittings of the High Court and Justices, see sec. 86 (a), *infra*; as to sittings of Full Court and single Justices, see Or. 48, rr. 1, 2; as to places for hearing appeals, see Rules of Court, Oct. 12th, 1903; as to venue in suits for penalties, taxes and forfeitures, see sec. 82, *et seq.*, *infra*; as to change of venue, see H.C.P. Act, sec. 25.

13. When any cause or matter has been heard at a sitting Matter heard at one place may be further dealt with at another place.
of the High Court held at any place the Justice or Justices before whom the matter was heard may pronounce judgment or give further hearing or consideration to the cause or matter at a sitting of the High Court held at another place.

14. (1) When any cause or matter, after being fully heard Reserved judgments. Cf. Q. 57 Vict. No 17 s. 8.
before a Full Court, is ordered to stand for judgment, it shall not be necessary that all the Justices before whom it was heard shall be present together in Court to declare their opinions thereon, but the opinion of any of them may be reduced to writing and may be read by any other Justice (a) at any subsequent sitting of a Full Court at which judgment in the cause or matter is appointed to be delivered.

(2) In any such case the question shall be decided in the same manner, and the judgment of the Court shall have the same force and effect, as if the Justice whose opinion is so read had been present in Court and had declared his opinion in person.

(a) "**Read by any other Justice.**"—But for the authority conferred by this section, the Justice would have been required to deliver personally his judgment in open Court; *Melville v. Phillips*, 9 Q.L.J., 114. See also *Allen v. Lodge*, 8 A.L.T., 129.

PART III.—JURISDICTION AND POWERS OF THE HIGH COURT GENERALLY.

Exercise of
jurisdiction.

15. The jurisdiction (a) of the High Court may, subject to the provisions of this Act, be exercised by any one or more Justices sitting in open Court (b).

(a) "**Jurisdiction.**"—The ideas of jurisdiction and judicial power are sometimes blended and confused but they are clearly distinguished in the Const., sec. 71, and in the heading to Part III. of the Jud. Act. Sec. 71, says that the judicial power of the Commonwealth shall be vested in the High Court and in such other Federal Courts as the Parliament creates and in such other Courts as it invests with Federal jurisdiction. "Judicial power" is there plainly contrasted with "Federal jurisdiction"; all the appellate power and a portion of the original power is absolutely vested in the High Court and cannot be taken from it, but Parliament is authorized, if it thinks fit, to invest the State Courts with Federal jurisdiction by which they could exercise *nearly* the whole of the original power. Jurisdiction, therefore, denotes the territorial boundaries within which and the descriptions of cases founded on the subject-matter and the character of the parties, with respect to which, a Court can judicially act. Judicial power is the whole mass of the judicial authority which can be exercised by the Court within the area of its jurisdiction. Thus the High Court is authorized to entertain a suit between residents of different States. On the face of the Record it must appear that such a dispute is involved. If it does, jurisdiction arises and remains unless or until the contrary appears during the progress of the case. This is jurisdiction. In administering justice in such a suit the Court may be called upon to apply and interpret either State laws or Federal laws or both. To determine rights and obligations, to grant appropriate remedies, to award damages and costs, to enforce respect to its writs by commitment for contempt if necessary, is judicial power. The High Court can entertain a suit respecting a cause of action arising under the Constitution. Such an allegation must appear on the face of the record; if so, jurisdiction attaches and remains until the contrary is shown. The Court then enters upon the investigation of the case, and ascertains and applies the law.

A total want of jurisdiction cannot be cured by the consent of the parties—*Jones v. Owen*, 5 D. & L. 669; 18 L.J.Q.B. p. 8; *Wellesley v. Withers*, 4 E. & B., 759; 24 L.J.Q.B., p. 134; *Reg. v. Shropshire County Court Judge*, 20 Q.B.D., 248; *Hannah v. Drake* (1902) 8 A.L.R. (C.N.), 69; *Ex parte Tighe*, Legge's Rep. (N.S.W.), 1100. No consent can give jurisdiction to a Court if the condition which goes to the root

of jurisdiction is not fulfilled. *Reg. v. Essex*, (1895) 1 Q.B. 38. Where an Act creating a Court is silent with respect to certain incidental matters the Court is sometimes held to have what is called "inherent jurisdiction," such as the power to correct errors or mistakes which appear in its own records (see Notes to Judiciary Act, sec. 4, "A Superior Court of Record") or to grant costs against a person who wrongly puts it into motion. *Pringle v. Secretary of State for India*, 40 Ch. D., 288; *Stevens v. Barnett*, 17 W.N. (N.S.W.), 38.

With respect to the territorial limits of the jurisdiction the rule of the High Court of Australia will, no doubt, be the same as that which guides the High Court in England, viz., in order that an action may lie between parties resident in Australia "in respect of an act committed in a foreign country, the act must be one which, if committed in Australia, would be actionable, and one which is not innocent according to the law of the country where it was committed; but it is not necessary that it should be the subject of civil proceedings in that country." The rule laid down in *Phillips v. Eyre*, L.R. 6 Q.B., 1; and *The M. Mozham*, 46 L.J.P., 17; 1 P.D., 107, applied. *Machado v. Fontes*, (1897) 2 Q.B. 231. See also Or. 8 as to actions against British subjects or foreigners out of the jurisdiction.

The territorial jurisdiction of the Court extends over the areas under the jurisdiction of the States at the commencement of the Commonwealth. It includes the mainland of Australia and Tasmania, and the islands annexed to the States by the Crown, and placed under the jurisdictions of the States. In Queensland the Court has jurisdiction over islands in Torres Straits included in the area described in the Schedule 43 Vict. No. 1, annexed pursuant to Letters Patent issued by Her Majesty in 1872 and 1878 and the proclamation in the *Government Gazette* of 21st July, 1879; *Reg. v. Gomez*, 5 S.C.R. (Q.) 189. With respect to the jurisdiction as to territorial waters, see *The Territorial Waters Jurisdiction Act* 1878.

(b) **Open court.**—See note (a) to the following section. A judge cannot pronounce judgment except in open Court unless under the authority of some statute; *Melville v. Phillips*, 9 Q.L.J., 114. See also *Allen v. Lodge*, 8 A.L.T., 129. Section 14 of this Act empowers an absent Justice of the Full Court, in any case in which judgment is reserved, to send his judgment in writing to be read by a brother Justice in open Court.

Single Justices.

16. The jurisdiction of the High Court may be exercised by a Justice sitting in Chambers (a) in the cases following:—

Jurisdiction in Chambers.

- (a) Applications relating to the conduct (b) of a cause or matter;
- (b) Applications relating to the custody (c) management or preservation of property, or to the sale (d) of property and the disposition of the purchase money;
- (c) Applications for orders or directions as to any matter which by this Act or by Rules of Court is made

subject to the direction of a Justice sitting in Chambers;

- (d) Any other applications which by this or any Act or by Rules of Court are authorized to be made to a Justice sitting in Chambers.

But on the application of either party the Justice may order the application to be adjourned into Court and heard in open Court.

(a) "**Jurisdiction in Chambers.**"—The jurisdiction of the High Court may be exercised either in Court or Chambers. By open Court is meant a Court to which all the public have access as a matter of right. "In open Court" in sec. 5 (a) *Debtors Act* of 1869 means "what anyone would take to be a Court, with the usual accompaniments of jury box, the witness box, the Judge's seat, and seats for solicitors, counsel and others" (*per Coleridge, C.J., Kenyon v. Eastwood*, 57 L.J.Q.B., 455). It does not include the private room of a Judge, though often used by him for hearing causes. A Judge sitting in Chambers does not mean that he is sitting in any particular room, but that he is not sitting in open Court (*Hartmont v. Foster*, 8 Q.B.D., p. 84). Whether the jurisdiction in any particular matter may be exercised by the Court or by a Judge depends upon the Statute or Rule of Court regulating it.

As regards the English practice as to Chamber jurisdiction practically a Judge at Chambers has jurisdiction in all cases where his jurisdiction is not excluded expressly or by necessary implication by some rule or statute. Except under very special circumstances where both the Court and Judge have jurisdiction, the application should be made to the latter. Where a Statute expressly or impliedly directs that the application shall be made only to the Court a Judge has no power to interfere, and *vice versa*. But when a Statute in general terms and without any special limitation either expressed or to be inferred from its terms, gives any power to the Court, it may be exercised by a judge at Chambers. When the expression 'Court or a judge' is used in the Rules of the Supreme Court, a judge at Chambers has jurisdiction; but when the expression 'the Court' alone is used, he has not." (*Chitty's Archbold Practice*, p. 1,401, 14th ed.). Compare also *Judicature Act* 1873 (36 & 37 Vic. c. 66, sec. 39). The *High Court Procedure Act* provides in several cases for the exercise of jurisdiction "by the Court or a Justice." "Justice," according to sec. 2 of that Act, means in the expression "Court or Justice," a Justice of the High Court sitting in Chambers. The words occur in secs. 6, 7, 12, 13, 14, 19, 20, 23, 24, 25, 35 (3), 36, 38, and *passim* through the rules in the schedule to *High Court Procedure Act*. In all such cases application may be made to either. Sometimes the word "High Court" only is used in a section—*vide* sec. 40, *Judiciary Act*; sec. 17, *High Court Procedure Act*. In such cases it will be a question of construction as to whether the jurisdiction can be exercised in Chambers as well as in Court. The words "Court" and "Court or a Judge" have been the subject of judicial interpretation. "The Court" has been held not to include "Judge at Chambers" (*Baker v. Oakes*, 2 Q.B.D. 171; *In re Davidson* (1899), 2 Q.B., 103). "The Court" means the Court sitting in open Court, and "a Judge" means a Judge sitting in Chambers, *per Kay, L.J., In re B.* (1892) 1 Ch. 463. See also *Dallow v. Garrold*, 14 Q.B.D., 546; *Salm Kyrburg v. Pomanski*, 13 Q.B.D., 222.

The discretion given to the "Court or a Judge" cannot be delegated; *Lambton v. Parkinson*, 35 W.R., 545.

The Justices may sit in Chambers either at the seat of Government or in any State (H.C.P. Act, sec. 6). When sitting in a State the Court is bound by the laws of the State as to procedure and evidence except as provided by the Constitution or laws of the Commonwealth.—*Jud. Act*, sec. 79. The State Supreme Courts are invested with jurisdiction in Chambers in certain matters pending in the High Court.—*Jud. Act*, sec. 17. A Justice has power to refer a case from Chambers to the Full Court.—*Jud. Act*, sec. 18. The decisions of a Justice in Chambers are subject to appeal—*Jud. Act*, sec. 34. Costs may be granted by a Justice in Chambers, and except with his leave, the decision may not be appealed from.—*Jud. Act*, secs. 26, 27.

MATTERS WHICH MAY BE HEARD IN CHAMBERS.—In addition to the cases mentioned in this section, the jurisdiction in Chambers includes the following statutory matters:—Remitter of matters pending in the High Court to a State Court.—*Jud. Act*, sec. 45; stay of proceedings in a District Registry, H.C.P. Act, sec. 6; transfer of causes from one Registry to another, *Ib.* sec. 7; order for trial with a jury, *Ib.* secs. 12, 13, 14; direction for trial of issues, *Ib.* secs. 13, 14; orders and commissions for examination of witnesses, *Ib.* sec. 19; direction as to evidence by affidavit or orally in any matter, *Ib.* sec. 20; amendment of defects, sec. 23; change of venue, *Ib.* sec. 25; reduction of security on appeal, *Ib.* secs. 35, 36; stay of proceedings on appeal, *Ib.* sec. 38. See also Or. 40, r. 1. As to classes of actions which may come before a Justice in which applications in Chambers may be made; see *Jud. Act*, sec. 30, and notes thereunder.

PROCEDURE IN CHAMBERS.—See Or. 40, r. 2, *et seq.*

(b) **"Conduct of a cause or matter."**—These words may be compared with those in the English Rules, Or. 16, r. 39. They have a definite meaning as applied to parties. The question often arises as to which of several parties shall have the conduct of proceedings. The general rule is that the plaintiff is the *dominus litis*. It often happens that several actions in which the parties, or some of them, are not identical are consolidated, or one action may be continued as a test action, and the others stayed; and then the question arises which plaintiff should have the management of the consolidated or test action. In cases of consolidation, the plaintiff who first issued his writ is generally given the conduct of the proceedings (*Teale v. Teale*, 1882, W.N., 83; *The Never Despair*, 9 P.D. 34). Where several actions raise the same or similar issues and one is selected to be a test action, the plaintiff in that action will have the conduct of the proceedings unless it is expressly provided in the order staying the other actions that the plaintiffs in these actions should have some control over the conduct of the test action. Where no such provision is made in the order, the plaintiff in the action selected as the test action will be the *dominus litis*; so with the defendants. If several defendants are sued by the same plaintiff in different actions, *e.g.*, for various infringements of the same patent, the Court will, in a proper case, either consolidate the actions, or select one representative case and send that for trial so as to determine all questions, the others being stayed meanwhile (*Encyclopedia of Laws*, vol. 9, p. 436. See further, *Daniell's Chancery Practice*, 7th ed., 812. A.P., Or. 16, r. 39, and cases cited thereunder).

"CAUSE," for definition of, see *Jud. Act*, sec. 2.

"MATTER," for definition of, see *Jud. Act*, sec. 2.

(c) "**The custody, management, or preservation of property.**"—These matters are further dealt with by Or. 37. Receivers may be appointed to assume the custody of property pending litigation concerning the same. As to cases in which receivers are appointed see *Kerr on Receivers*, 4th ed., Chap. II. See also note to sec. 29, H.C.P. Act. As to mode of application for the appointment of a receiver, see Or. 37, r. 7. Where a *prima facie* case of liability under contract is established an order may be made for the preservation or interim custody of the subject matter of litigation, Or. 37, r. 4; as to when and how such application should be made, see *ib.* r. 5.

Applications in respect of the management of property are made for instance in connection with trust estates under the direction or control of the Court. See *Daniell's Chancery Practice*, 7th ed., p. 864.

An order may be made upon the application of any party to a cause or matter, and upon such terms as are just, for the inspection, detention, and preservation of any property being the subject matter of the litigation. Or. 37, r. 1. The preservation of property may be secured by the grant of an interim injunction (*Strelley v. Pearson*, 15 C.D., 113), by the appointment of a receiver (*Boehm v. Wood*, 2 Jac. & W., 236; *Gibbs v. David*, L.R. 20, Eq. 373), by payment into Court (*Wanklyn v. Wilson*, 35 C.D., 180), by the property being ordered to be given up to and detained by an officer of the Court (*Velati v. Braham*, 46 L.J.C.P. 415). "The protection of legal rights to property from irreparable or at least from serious damage pending the trial of the legal right was part of the original and proper office of the Court of Chancery. In exercising the jurisdiction the Court does not pretend to determine legal rights to property, but merely keeps the property in its actual condition until the legal title can be established. The Court interferes on the assumption that the party who seeks its interference has the legal right which he asserts, but needs the aid of the Court for the protection of the property in question until the legal right can be ascertained." *Kerr on Injunctions*, p. 11, Chap. 3, sec. 1.—"Protection of legal rights to property pending litigation." See also *Daniell's Chancery Practice*, 7th ed., p. 1,345.

Application for injunction may be either *ex parte* or on notice.—See Or. 37, r. 7.

(d) "**Sale of property and disposition of purchase money.**"—The States have re-enacted 15 & 16 Vict. c. 86, s. 55, which provides that if in any cause or matter relating to any real estate it shall appear necessary or expedient that the real estate or any part thereof should be sold, the Court or a judge may order the same to be sold. See, for instance, 31 Vict. No. 18, s. 55 (Q.), and practice as to sales by the Courts (Q.), Or. 68; *Supreme Court Act* 1890, sec. 63 (5c) (Vic.), and Or. 51, Or. 55; *Equity Act* 1901, sec. 14 (N.S.W.), and as to practice thereunder see *Rich. Practice in Equity*, p. 14. As to the practice under these sections, see *Daniell's Chancery Practice*, 7th ed., 872.

As to an order for the sale of perishable goods, see Or. 37, r. 6.

State Supreme
Courts invested
with jurisdiction
in Chambers.

17. (1) In any matter pending (a) in the High Court, not being a matter in which the High Court has exclusive juris-

diction, the Supreme Court of a State shall, subject to any Rules of Court, be invested with federal jurisdiction to hear and determine any applications which may be made to a Justice of the High Court sitting in Chambers.

(2) Such jurisdiction may be exercised by a single Judge of the Supreme Court sitting in Chambers, and the order of the Judge shall have the effect of an order of a Justice of the High Court sitting in Chambers.

(a) "**Matter pending in the High Court.**"—An action may be brought in the High Court involving a dispute between residents of different States or arising under the Constitution, or involving its interpretation. The above section gives the Supreme Court of a State jurisdiction to hear and determine applications in the action, whilst it is pending in the High Court, of the class generally disposed of by a Judge sitting in Chambers, such as those enumerated in sec. 16—see notes thereto. From judgments and orders so pronounced by a Supreme Court of a State, there is a right of appeal to the High Court under sec. 35 (c), irrespective of the amount of money or value of property, or civil right involved. As to when matters are pending, see note to sec. 32, *infra*. As to matters in which the jurisdiction of the High Court is exclusive, see sec. 33, *infra*.

18. Any Justice of the High Court sitting alone, whether in Court or in Chambers, and any Judge of the Supreme Court of a State exercising federal jurisdiction may state any case (a) or reserve any question for the consideration of a Full Court, or may direct any case or question to be argued before a Full Court, and a Full Court shall thereupon have power to hear and determine the case or question.

Reference to
Full Court.

Jud. Act 1873
s. 46.

(a) "**May state any case.**"—The *Judicature Act 1873*, sec. 46, on which this section has been modelled, enabled a judge to reserve any case or point in a case. When a whole case has been reserved by a Judge for the consideration of the Full Court, the latter Court can determine it and direct judgment to be entered up without referring it back to the primary Judge; *James v. Gibson*, 17 V.L.R., 104. Where a Judge has reserved a case or points in a case for the determination of the Full Court, he is bound by such determination and must direct the entry of judgment accordingly; *May v. Martin*, 12 V.L.R., 115. Upon points reserved at the trial of an action for the consideration of the Full Court, the Court has no jurisdiction to order a new trial; *Smart v. Lobb*, 16 V.L.R., 496; nor to disregard the findings of a jury; *Slade v. Victorian Railways Commissioners*, 11 A.L.T., 5. Where a single judge reserves points for the consideration of the Full Court, the Victorian practice is for the party who desires to set these points down for argument to make out a *præcipe* only, and then the questions are set down for hearing; *May v. Martin*, 12 V.L.R., at p. 121. Under the Queensland practice where a motion before a single Judge is referred to the Full Court, the motion should not be set down on the Full Court paper, but should be moved by counsel when motions are called for; *In re Wagners Will*, 11 Q.L.J., 57. As a

general rule of practice in all proceedings on points reserved the plaintiff has the right to begin; *Campbell v. Kerr*, 12 V.L.R., 384; *Greig v. Hutchinson*, 16 V.L.R., p. 335. As a rule only one counsel can be heard on a case stated; *Sivan v. Perpetual Trustees Association*, 3 A.L.R. (C.N.), 53.

A question reserved may be merely collateral or subsidiary to the main issue such as the admissibility of evidence. In such proceeding the sole function of the High Court would be to answer the question submitted to it and send it back to the Justice or Judge who had reserved it and who will then proceed with the hearing and determination of the suit.

A Full Court.

Quorum of a Full Court.

19. Except as hereinafter provided, a Full Court may be constituted by any two or more Justices of the High Court sitting together.

Quorum on appeals from Judges of federal jurisdiction.

20. The jurisdiction of the High Court to hear and determine appeals from judgments—

- (a) of a Justice of the High Court exercising the original jurisdiction of the High Court; or
- (b) of the Supreme Court of a State exercising federal jurisdiction when such jurisdiction is exercised by a single Judge; or
- (c) of any other court exercising federal jurisdiction; or
- (d) of the Inter-State Commission;

and to hear and determine applications for a new trial of any cause or matter, after a trial before any such Justice or any such Court exercising federal jurisdiction, shall be exercised by a Full Court.

Applications for leave to appeal to High Court.

21. (1) Applications for leave or special leave to appeal (a) to the High Court from a judgment of the Supreme Court of a State, or of any other Court of a State (b) from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall be heard and determined by a Full Court.

Quorum of Justices on appeals from State Supreme Courts.

(2) The jurisdiction of the High Court to hear and determine appeals from judgments of the Supreme Court of a State sitting as a Full Court, or of any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall be exercised by a Full Court consisting of not less than three Justices.

(a) **"Leave or Special Leave to Appeal."**—Under the *Judiciary Act*, sec. 35 (a) 'no appeal can be brought to the High Court from an interlocutory judgment of the Supreme Court of a State, except by leave of the Supreme Court, or by leave of the High Court. By 35 (b) there can be an appeal from the Supreme Court of the State to the High Court in any civil or criminal matter whatsoever with respect to which the High Court thinks fit to grant "special leave to appeal"—see notes to sec. 35 (a) and (b).

(b) **"Or of any other Court of a State."**—The Constitution, sec. 73 (ii.), recognizes four classes of Courts from the judgments of which appeals may be brought to the High Court—(1) Federal Courts, other than the High Court, created by the Parliament; (2) State Courts invested with and exercising federal jurisdiction; (3) Supreme Courts of States; and (4) other Courts of States from which, at the establishment of the Commonwealth, an appeal lay to the Queen in Council. This provision recognizes that there may be some State Courts other than the Supreme Courts from which an appeal could be brought direct to the Queen in Council. Among these Courts may be mentioned the Court of Appeal which was established in South Australia by a local Act, 7 Wilm. IV., No. 5, confirmed and strengthened by 24 & 25 Vict., No. 5. This South Australian Court still exists, although it is rarely resorted to. Under the Orders in Council 1860, an appeal could be brought direct from that Court to the Queen in Council.—*Moore's Comw. of Aus.*, p. 251.

22. Applications to the High Court for a certificate that a question as to the limits *inter se* (a) of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, which has been decided by the High Court, is one which ought to be determined by the King in Council, shall be heard and determined by a Full Court consisting of not less than three Justices.

Quorum for granting leave to appeal to the King in Council or to High Court.

(a) **"The limits *inter se*."**—There are three fundamental provisions in the Constitution respecting finality in appeal cases reaching the High Court. The first is, that in all appeals whatsoever, whether from a Justice of the High Court or from a Court exercising federal jurisdiction, or from a Supreme Court of a State, the judgment of the High Court in all such cases shall be "final and conclusive."—Const., sec. 73. The second is, that although the right of a litigant to appeal from the High Court to the Privy Council is taken away, in all these cases, the Constitution does not impair any right which the King may be pleased to exercise by virtue of his Royal prerogative to grant "special leave of appeal" from the High Court to His Majesty in Council.—Const., sec. 74. The third is, that to this reservation of the prerogative there is one exception, viz., "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council."—Const., sec. 74.

See also sec. 35, *post*.

Decision in case
of difference of
opinion.
Qd. law.

23. When the Justices sitting as a Full Court are divided in opinion as to the decision to be given on any question—

- (a) the question shall be decided according to the decision of the majority, if there is a majority; but
- (b) if the Court is equally divided in opinion, the opinion of the Chief Justice or if he is absent the opinion of the senior Justice present shall prevail, except in the case of an appeal from a decision of a Justice of the High Court or a Judge of the Supreme Court of a State exercising federal jurisdiction, in which case the decision appealed from shall be affirmed.

Provided that in the last-mentioned case if the Justice or Judge whose decision is appealed from reports to the Court that he desires that the matter shall be determined without reference to the fact that he has pronounced or given the decision, the opinion of the Chief Justice or senior Justice present shall prevail.

The validity in certain cases of a judgment pronounced in accordance with sub-section (b) was questioned in *The Colonial Sugar Co. Ltd. v. Irring*, Brisbane "Courier" Reports, p. 325 (3rd Dec., 1903), where Real, J., expressed a doubt whether the power given by the sub-section was constitutional, though possibly authorised by the *Colonial Laws Validity Act*, 23 & 29 Vict., ch. 63, sec. 5.

Enforcement of Process.

Contempt.
See *Jud. Act*
1873 s. 16.

24. The High Court shall have the same power to punish contempts (a) of its power and authority as is possessed at the commencement of this Act by the Supreme Court of Judicature in England.

(a) "**Punish contempt.**"—Contempt of Court has been defined as a disobedience to the Court, or an opposing, or despising the authority, justice, or dignity thereof. It commonly consists in a party doing otherwise than he is enjoined to do, or not doing what he is commanded by the process, order, or decree of the Court.—*Viner's Abridg.*, tit. "Contempt" A. In the case of *St. James Evening Post* (1742), 2 Atk., p. 471, Lord Chancellor Hardwick said:—"There are three different sorts of contempt; one kind of contempt is scandalizing the Court itself. There may be likewise contempt of this Court in abusing parties who are concerned in causes here. There may be also a conflict of this Court, in prejudicing mankind against persons before the cause is heard. And he adds:—"There cannot be anything of greater consequence than to keep the streams of justice clear

and pure, that parties may proceed with safety both to themselves and their characters." *Rex v. Almon* (1765), Wilm. 256, it was stated that contempt of Court involves two ideas—first, contempt of its power; and second, contempt of its authority. It has been an acknowledged principle that the power of summarily punishing for contempt is inherent in all Courts of Record from time immemorial; *Miller v. Knox* (1838), 4 Bing. N.C., 574; Blackstone's Comm. Book IV., c. 20-iii; *Rex v. Davison* (1821), 4 Barn. & Ald., p. 340. There was formerly no necessity to specify the particular matter which constituted the contempt; *Sheriff of Middlesex* (1840), 11 Ad. & E., 273; but the modern practice has been to require that the alleged offence should be specified. This jurisdiction, as in other matters of the old Supreme Courts at Westminster, is now by virtue of the *Judicature Act* 1873, 36 & 37 Vict., c. 66, sec. 16, vested in the Supreme Court of Judicature in England, and is exercisable by the several divisions of that Court.

According to modern cases the various kinds of contempt of Court may be classified under two heads—(1) Contempts direct, (2) Contempts indirect, or consequential; *Oswald on Contempt*, 2nd ed. Any direct contempt is some insulting or aggressive act on the part of the offender, either in the face of, or within the precincts of the Court, or away from the Court, such as some violent act or offensive language in the presence of the Court, sending libellous letters to the Judge of a Court, attempting by communication to influence the decision of the Court, interfering with a sale directed by the Court, commenting on proceedings pending in a Court with the object of improperly influencing the decision of the Court. Indirect or consequential forms of contempt fall within the class of cases where the offence is constituted by disobedience or neglect of some express direction of the Court, such as disregarding injunctions, or interfering with receivers or other persons acting under authority of the Court; a party disobeying an injunction is liable to be committed to prison for contempt; a person not a party to the action or included in the injunction may be committed for contempt who, knowing of the injunction, aids and abets the person enjoined in committing a breach of the injunction; *Seacord v. Puterson* (1897), 1 Ch. 545.

The following cases of direct and indirect contempt have been decided by the Australian Courts:—The publication of newspaper articles of such a nature as being likely to lower the Court in the estimation of the public, and comments made during the proceedings which are directly calculated to prevent a fair trial amount to a contempt of Court. *In re Syme, ex parte Daily Telegraph Newspaper Company*, 5 V.L.R. (L.) 291; *In re Syme, ex parte M'Kinley*, 6 V.L.R. (L.) 51; *In re Feigl, ex parte Herman*, 9 V.L.R. (L.) 143. Acts done or words spoken or written tending to create a bias or prejudice in the minds of Judges, jurors, or witnesses constitute a contempt of Court, even when not springing from any wrong intention. Letters in a newspaper written by a solicitor pending a criminal trial, and which were calculated to poison the minds of a jury, were held a contempt; *In re Daly*, 15 V.L.R. 402. The Court may punish for contempt both the proprietor and the publisher of a newspaper for matters appearing therein tending to prejudice the fair trial of an accused, even though neither the proprietor nor the publisher was aware of the intention to publish such matters or their actual publication until the newspaper has passed into circulation; *In re Syme, ex parte Worthington*, 24 A.L.T. 123. See also *Ex parte Butler*, 19 N.S.W.

L.R. (L.) 132. As to contempt for articles published in newspapers; see also *Re Northern Argus*, 1 Q.L.J. Supp. 37; *In re Elsworth, ex parte Tompsitt*, 17 V.L.R. 391; *In re Norton*, 18 N.S.W. L.R. (L.) 130; *Ex parte Caulfield*; *In re Norton*, 19 N.S.W. L.R. (L.) 113; *In re Haynes*, 17 W.N. N.S.W. 164; 21 N.S.W. L.R. 359; *Ex parte Smith*, 1 S.R. N.S.W. 55. Comments on a witness held a contempt; *R. v. M'Creadie*, 16 W.N. N.S.W. 110. The Court has power of its own motion to bring before it and punish persons guilty of contempt (*In re the Evening News*, 1 N.S.W. L.R. 211), and to institute proceedings for the summary and immediate punishment for contempt of its authority whether in reference to a pending case or not; *In re Echo and Sydney Morning Herald*, 4 N.S.W. L.R. 237; but in *Re Syme, ex parte Worthington (supra)*, it was held that the power of the Court is limited to cases pending before the Court itself. Failure by a person to comply with an order of the Court to stop a noise on his premises when such a noise disturbs the proceedings of the Court is a contempt of the Court; *In re Dakin*, 13 V.L.R. 522. The Judge may in such cases act upon the evidence of his own senses and upon the reports of his officers as to its author (*Ib*). Where contempt is alleged by disobedience of an order of the Court, an explicit statement of the facts constituting the alleged contempt is required; *M'Leod v. Henty*, 25 V.L.R. 648. Members of a public body may be guilty of a contempt in refusing to obey an order of the Court. *In re the Municipal District of Lambton*, 20 N.S.W. L.R. 378. The following cases were held to constitute a contempt: Non-payment of costs by a next friend; *Bradford v. Cavanagh*, 15 W.N. N.S.W. 226; disobedience for non-compliance with an order for payment forthwith of a weekly sum for the maintenance of wife though wrongly included in the decree nisi; *Nisbet v. Nisbet*, 24 V.L.R. 340; non-payment of costs occasioned by entering a caveat against grant of probate; *In re Mary Elliott, ex parte Duff*, 5 A.L.R. C.N. 46; failure by an executrix to file her accounts within the prescribed time; *In re Lockhart*, 24 V.L.R. 730; non-payment of costs; *Merritt v. Smith*, 10 S.C.R. (N.S.W.) 230; *Ex parte Guest*, 1 S.C.R.N.S. (N.S.W.) 129; assault on a process server; *In re Hartridge*, 27 V.L.R. 22; interference with a sheriff's officer; *In re Hogg and Christie*, 19 N.Z. L.R. 856; *R. v. Campbell*, 14 L.R. N.S.W. 532; *Ex parte Sidney*, 7 S.C.R. (N.S.W.) 134; *R. v. Saville*, 8 S.C.R. (N.S.W.) 19; failure of witness to obey a subpoena; *In re Fitzgerald*, 7 Q.L.J. N.C. 103; see also *MacKenzie v. Dunn*, 7 S.C.R. Eq. (N.S.W.) 88; disobedience of an order for inspection; *R. v. Dibbs*, 1 N.S.W.L.R. 17. A Judge sitting in Chambers has power to commit for contempt of Court; *Weedon v. Phillips*, 12 A.L.T. 166.

In the United States a similar power to commit for contempt is vested in the Federal Courts. At one time it was extended so far as to punish the editor of a newspaper for publishing an account of a trial whilst the trial was in progress, and there were many other cases in which this power to punish for contempt was extended. In one case the District Judge of the State of Missouri punished a lawyer for contempt and he was impeached for his conduct on that occasion; unsuccessfully, however, because the constitutional majority of the Senate failed to agree that he had committed any impeachable offence. In consequence of what then occurred an Act was passed on 2nd March, 1831, entitled "An Act Declaratory of the Law Concerning Contempts of Court." It provided that "the power of the several Courts of the United States to issue attachments and inflict summary punishments for contempts of Court shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said

Courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of said Courts in their official transactions, and the disobedience or resistance by any officer of the said Courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said Courts ; " *Curtis*, p. 175. This Act did not in any way interfere with the power of the Federal Courts to enforce their judgments and decrees. The case of *In re Debs, Petitioner*, decided 1895 and reported in 158 U.S., p. 564, is a striking illustration of the manner in which the Courts can enforce compliance with its decrees and injunctions by their power to commit to prison for disobedience ; see articles by F. J. Stimson on "The Modern Use of Injunctions," *Political Science Quarterly*, X. 189 (1895), and by William H. Dunbar "on Government by Injunction," *Law Quarterly Review*, XIII., 347 (1897) ; *Boyd*, p. 667.

Practice.—As to practice with respect to committal for contempt, see Or. 35.

25. The process (a) of the High Court shall run, and the judgments (b) and orders of the High Court shall have effect and may be executed, throughout the Commonwealth.

Powers of
Court to extend
to whole
Commonwealth.

(a) "**Process.**"—In its widest and most comprehensive signification the word "process" includes not only the writs of summons, but all other writs which may be issued during the progress of an action, and also those writs which are used to carry the judgments of the Court into effect, and which are termed writs of execution. Process is the doing of something in a proceeding in a civil or criminal Court. What may be done without the aid of a Court is not process. A writ of summons, or a writ of sequestration is process. A distraint for rent at common law or by statute is not process. *Blackmore's Case*, 8 Rep. 157 (a) ; *R. v. Crisp*, 3 Bl. Com. 3, 6, 7 ; *In re Watson*, 6 Q.L.J., 208. All steps taken in execution such as seizure and sale are in the natural meaning of the word comprehended in the term, "process ;" *per Lynch, J.*, in *Re Delahoyd*, 11 Irish Ch. Rep. 407. "The power of each Court over its own process is unlimited ; it is a power incident to all Courts, inferior as well as superior ; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice." *Per Alderson, B.*, *Cocker v. Tempest*, 7 M. & W., 502, cited *per Willes, J.*, *Stammers v. Hughes*, 18 C.B., 535.

(b) "**Judgments.**"—As to judgments, see *Jud. Act*, sec. 31 ; as to execution, see *Jud. Act*, sec. 31 ; *H.C.P. Act*, sec. 26.

Costs.

26. The High Court and every Justice thereof sitting in Chambers shall have jurisdiction to award costs (a) in all matters brought before the Court, including matters dismissed for want of jurisdiction (b).

Costs.

(a) "**Costs.**"—As to appeal on question of costs, see sec. 27 *infra* ; as to costs in suits in which the Commonwealth or States are parties, see sec. 64 *infra* ; as to power of Court to make rules as to taxation, see sec. 86 *infra* ; as to taxation and allowance of fees payable to barristers and solicitors and review of taxation, see *Rules of Court*, Oct. 12th, 1903, rr. 3, 4 ; as to costs generally, see Or. 46 ; as to

security for costs, see Or. 25, r. 9 *et seq.*; as to security on appeal, see *High Court Procedure Act*, secs. 35, 36. This section confers jurisdiction to award costs in all matters (see definition) brought before the Court. In proceedings under statutes the old practice was that apart from express provision the Court had no jurisdiction to deal with costs; *Re Charity Schools of St. Dunstan in the West*, L.R. 12 Eq. 537; *In re Wrexham, Mold and Connahs Quay Railway*, per Lindley, M.R., 1900, 1 Ch., 269. See also *Booker v. Gill*, 15 W.N. (N.S.W.), 158; *Service v. Flatau*, 16 W.N. (N.S.W.), 248; but compare also *Stevens v. Barnett*, 17 W.N. (N.S.W.), 38. "Costs are the creature of statute," per Lutwyche, J., *In re Birkman*, 1 S.C.R. (Q.), p. 15; per Griffith, C.J., *R. v. The JJ. of South Brisbane*, 11 Q.L.J., 83. Where an Act of Parliament gives jurisdiction to determine questions, but is silent as to costs, the Court has inherent jurisdiction to order a person wrongly putting it in motion to pay the costs; *Re Bombay Civil Fund Act*, 40 C.D. 288.

(b) "**Want of jurisdiction.**"—This enactment is made to meet the old rule of "no jurisdiction, no costs," for applications of which see *In re Lister Henry*, 9 A.L.T., 125; *Cayron v. Russell*, 24 V.L.R., 997; 21 A.L.T., 39.

No appeal as to costs.

27. An appeal (a) shall not lie to the High Court from a decision of a Justice of the Court, or from a decision of the Supreme Court of a State exercising federal jurisdiction, with respect to costs which are in the discretion (b) of the Court, except by leave (c) of the Justice or Court.

(a) "**Appeal.**"—An appeal will lie without leave in respect of costs where a question of principle of law or practice is involved. (*Per James, L.J., Re Rio Grande &c. Co.*, 5 C.D., 282; *Re Raynes Park Golf Club*, (1899) 1 Q.B., 961; *Bew v. Bew*, (1899) 2 Ch. 467; *sed vide* the judgment of Lindley, L.J., *Adlington v. Conyngham* (1898), 2 Q.B., 494. See also *No. 1 North Phoenix G.M. Co. Ltd. v. Phoenix G.M. Co. Ltd.*, 6 Q.L.J., 310; *Starkey v. Salm*, 7 Q.L.J., N.C., 79. Where the terms as to costs were unreasonable under the circumstances, the Full Court reviewed the order made by the judge at the trial; *Kilpatrick v. Huddart Parker & Co. Ltd.*, 22 V.L.R., 369. No appeal lies from the discretion of a judge as to costs where there is no question of principle involved; *Crowder v. Horgan*, 3 W.A.L.R., 31. There must, however, be a clear case before the discretion of a Judge will be interfered with; *James v. Greenwood*, 2 A.J.R., 41. In *Moore v. Nolan*, 4 V.L.R. (L.) 465, the Court refused to interfere. The Full Court of Victoria held that it had no jurisdiction to hear an appeal on a question of costs only where they are by law left to the discretion of the Court below, whether it has exercised its discretion from right or wrong reasons, or has exercised no discretion at all, unless the leave of the Court or Judge making the order appealed from shall have been first obtained; *Bank of Australasia v. Herrick*, 12 V.L.R., 532, following *Snelling v. Pulling*, 29 C.D., 85; *Re Gilbert*, 28 C.D., 549. See also *Jordan v. Walker*, 11 V.L.R., 346. For further authorities see cases cited A.P. under sec. 49, *Judicature Act* 1873.

(b) "**Discretion.**"—Subject to the provisions of the rules, the costs of and incident to all proceedings in the Court shall be in the discretion of the Court or a Justice, Or. 46, r. 1, *et seq.*

(c) "**Except by leave.**"—If the judge does give leave under this section, such order will not be over-ruled unless the discretion has been exercised on a wrong principle or there has been a disregard of facts; *Re Gilbert*, 28 C.D., 549; *Young v. Thomas* (1892) 2 Ch. 134.

Absent Defendants (a).

28. When there are several defendants in any cause pending in the High Court, if any defendant is not served with process and does not voluntarily appear, the Court may nevertheless entertain the cause and proceed to hear and determine it between the parties who are properly before the Court; but the judgment given in the cause shall not conclude or prejudice other parties who are not regularly served with process and do not voluntarily submit to the jurisdiction of the Court.

Non-appearance
of some
defendants.
U.S. 737.

(a) "**Absent defendants.**"—The United States law (Revised Statutes sec. 737), from which this section is taken applies to cases "where there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought." It has been held under this section as regards suits at law, that on a joint contract, where a citizen sues the State where the suit is brought and a citizen of another State, and both are served with process, jurisdiction attaches, and the voluntary appearance of the latter will not deprive the Court of jurisdiction; *McCloskey v. Cobb*, 2 Bond 16, Fed. Cas., No. 8702; *Taylor v. Cook*, 2 M'Lean, 516; Fed. Cas., No. 13,789; as any of the parties to a joint contract may be sued; *Clearwater v. Meredith*, 21 How., 499. So an action lies against one of several executors; *U.S. v. Backus*, 6 M'Lean, 443, Fed. Cas., No. 14,491; and so of corporations where some of the corporators are citizens of another State than where the corporation was created; *Louisville R. Co. v. Letson*, 2 How., 497, but see *Com. and R. Bank v. Slocomb*, 14 Peters, 60. A creditor may maintain an action against partners some of whom are not residents of the district; *Imbusch v. Farwell*, 1 Black, 566. As regards suits in equity, it has been held that persons having an interest, and who should be made parties, are necessary parties, without whom no decree can be entered; *Shields v. Barrow*, 17 How., 130; *Northern Ind. R. Co. v. Mich. Cent. R. Co.*, 15 How., 233; *Ribon v. Railroad Cos.*, 16 Wall., 445; *Winter v. Lullow*, 3 Phila. 464; Fed. Cas., No. 17,891. In *Shields v. Barrow* (*supra*), the Court held they can make no decree affecting the interest of any absent party, although that absent party might have been a competent party, if he could have been served, or might be a competent party if he chose to come in voluntarily; but in the absence of a party whose interests will be affected by the decree, they cannot make any decree affecting his interests, and, if they can make no decree at all without affecting his interests, then they can make no decree.—*Curtis' Jurisdiction of the United States Court*, p. 135. See also *Minnesota v. Northern Securities Co.* (1901), 184 U.S. 199. As to parties held to be necessary and not necessary, see *Dextey's Federal Procedure*, notes to § 24; see also sec. 29 (*infra*). Notes to Or. 2.

29. When, in any suit of which the High Court has original jurisdiction, any defendant is not a resident (a) of or found

Absent
defendants.

within the Commonwealth and does not voluntarily appear in the suit, the Court may nevertheless proceed to exercise its jurisdiction after such notice to the defendant and upon such terms as are prescribed by Rules of Court.

(a) **"Defendant not a resident."**—The authority of a colonial Legislature to pass statutes authorizing the initiation of legal proceedings against defendants absent from the territory of the law-maker has been more than once questioned, but is now firmly established. In *Banks v. Orrell* (1878), 4 V.L.R. (L.) 219, the Full Court of Victoria held it was bound by the enactment of the Legislature, and that sec. 90 of the *Common Law Procedure Statute* 1865 (No. 274) conferred power to serve a writ of summons upon a foreigner resident out of the jurisdiction. Higinbotham, J., *R. v. Call, ex parte Murphy* (1881), 7 V.L.R., at p. 123, remarked:—"The provision for the service of writs of summons within fifty miles of the frontiers of Victoria (*Common Law Procedure Statute* 1865, sec. 90), the attachment in Victoria of the property of an absent defendant (*ib.* secs. 211-228), and the *Prevention of the Influx of Criminals Act*, 18 Vict., No. 3, sec. 2, are instances amongst others which could be cited of interference by the Victorian Legislature with persons or property beyond the territorial limits." In a recent case, *Ashbury v. Ellis* (1893), A.C. 339, the Privy Council held that 15 & 16 Vict., c. 72, the Act of Parliament which gives to the Legislature of New Zealand power "to make laws for the peace, order, and good government of New Zealand," on its true construction empowered the Legislature of New Zealand to subject to its tribunals persons who are neither by themselves nor their agents present in the colony; that a law of the local Legislature authorizing the local Courts in any case of contracts made or to be performed in the colony to decide whether they will or not proceed in the absence of the defendant was *intra vires* and reasonable. Whether a judgment against an absentee without service of the writ will be enforced by the Courts of another country is a matter for those Courts to determine, and does not affect the validity of the local law. As to whether a judgment obtained in a colonial Court under such an Act where the defendant is or has been a resident of the colony will be recognized in the Courts of England; see *Lefroy's Legislative Power in Canada*, p. 332.

At common law a writ could never be served on a defendant out of the jurisdiction. Down to the time of the *Common Law Procedure Act* 1852, there was no provision for such service. For a history of service out of the jurisdiction see the judgments of Huddleston, B., in *Lenders v. Anderson*, 12 Q.B.D., at p. 56; of Chitty, J., in *Re Busfield*, 32 C.D., 123; and Field, J., in *Hewitson v. Fabre*, 21 Q.B.D., 8; *Sirdar Gurdial v. Rajah of Faridkote* (1894), A.C. 670. This section contemplates the service of originating proceedings or notice in lieu thereof upon a defendant abroad. The Court may proceed in the absence of the defendant after such notice and upon such terms as are prescribed by Rules of Court. Or. 8, r. 1, enumerates the cases in which service may be effected without the jurisdiction. Service of an originating proceeding may be made upon a British subject residing beyond the Commonwealth; *ib.* r. 2, and of notice of the originating proceeding upon a foreigner residing out of the jurisdiction; *ib.* r. 3. Upon the proof of service, in accordance with the rules, the Court or a Judge may direct the

plaintiff to proceed in the cause, although the defendant does not appear; Or. 8, rr. 2, 3. A defendant who denies the jurisdiction of the Court may enter a conditional appearance; Or. 9, r. 12.

Compare also sec. 733, Rev. Statutes of United States and notes thereon in *Desty's Federal Procedure*, § 25, p. 146.

For definition of residence see notes to *High Court Procedure Act*, sec. 6 (2).

PART IV.—ORIGINAL JURISDICTION OF THE HIGH COURT.

Extent of Jurisdiction.

30. In addition to the matters in which original jurisdiction is conferred on the High Court by the Constitution*, the High Court shall have original jurisdiction in all matters arising under the Constitution or involving its interpretation. §

Original jurisdiction conferred.

“Original Jurisdiction of the High Court.”—The Constitution has conferred original jurisdiction on the High Court in certain matters which cannot be taken from it, and Parliament is authorized to confer on it additional jurisdiction. The combined result of the grant by the Constitution and the grant by the *Judiciary Act*, sec. 30, is that the High Court has original jurisdiction in the following matters:—

- 1.* “Arising under any treaty:” (a) Const., sec. 75 (I).
2. “Affecting Consuls (b) or other representatives of other countries:” Const., sec. 75 (II).
3. “In which the Commonwealth (c), or a person suing or being sued on behalf of the Commonwealth, is a party:” Const., sec. 75 (III).
4. “Between States (d), or between residents (e) of different States, or between a State and a resident of another State:” Const., sec. 75 (IV).
5. “In which a writ (f) of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:” Const., sec. 75 (V).
6. § “Arising under the Constitution or involving (g) its interpretation:” (h) Const., sec. 76 (I.), and *Jud. Act*, sec. 30.

It is proposed to consider in detail the grant of judicial power contained in each of these sub-sections, but before doing so attention may be drawn to section 33 *infra*, which enables the High Court to make orders or direct the issue of writs for certain special purposes therein enumerated. Sub-secs. (c) and (d) appear to contain grants of original jurisdiction as to the High Court; as to whether they are additional to or merely declaratory of the grant recited in and conveyed by sec. 30 remains to be considered.

(a) "**Matters arising under any treaty.**"—A treaty is, in its nature, a compact between two or more independent nations giving rise to mutual rights and obligations. None but sovereigns and independent powers, or their authorized representatives, are competent to contract treaties with foreign nations: *Todd's Parl. Gov. in Brit. Col.* (2nd ed.) p. 247. Treaties are primarily matters of international law, and according to English law, the rights and obligations which arise under them between the high contracting parties, are not matters of positive law, they are matters in which the judicial courts have nothing to do. As a rule a treaty does not of itself create legal relations between private individuals, and the municipal courts can neither enforce its observance nor decide whether it has been violated; *Elphinstone v. Bedreechund*, 1 Knapp, 340.

In England a treaty does not of itself have legislative effect and it cannot be the subject of judicial cognizance until it has received legal sanction and has been carried into operation, either by an Act of Parliament, or by the Crown in the exercise of statutory authority. Thus a treaty of cession does not operate to change the national character of a place until some act of possession has been performed by the Crown (*The Fama*, 5 Rob. Adm. 106). Commercial treaties are frequently executed by Act of Parliament which gives them legislative effect; see for instance the Imperial Act, 37 Geo. III., c. 97, carrying into effect a treaty between Great Britain and the United States. Extradition treaties are carried into effect by Orders in Council under the Imperial *Extradition Acts* 1870 and 1873 and 1895; international arrangements as to copyright, by Order in Council under the International Copyright Acts; *Quick and Garran's Annot. Const.*, pp. 769-70. "The legislature of any colony is free to determine whether or not to pass laws necessary to give effect to a treaty entered into between the Imperial Government and any foreign power in respect to which such colony has a direct interest;" *Todd's Parl. Gov. in Col.*, p. 275. In the United States treaties are part of the supreme law of the land binding the judges in every State; U.S. Const. Art. 6, cl. 2; *Desty's Federal Procedure*, § 12, p. 67; *U.S. v. The Schooner Peggy*, 1 Cranch, 103.

The power of making laws to give effect to treaties, so far as they concern the Commonwealth, must be deemed to be included in sec. 51, xxix., "External affairs." The words "external affairs" are, however, wide enough to confer on the Federal Parliament the legislative power proper to a colonial legislature in respect of treaties. Sec. 132 of the *British North American Act*, gives the Parliament and Government of Canada "all powers necessary or proper for performing the obligations of Canada or of any province thereof as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries." Under that section it was held that the (Imperial) *Extradition Act* 1870, applied to Canada, and was not inconsistent with the section; and that the (Canadian) *Extradition Act* 1839, must be read with it; *Ex parte Charles Worms*, 22 Lower Can. Jur., 109; *Quick and Garran's Annot. Const.*, p. 770. When a treaty has been duly carried into effect by legislative or executive authority legal rights and liabilities may arise under it which may be the subject of judicial cognizance, and the treaty itself may become the subject of judicial interpretation. A treaty is to be interpreted liberally and in such a manner as to carry out its manifest purpose; *Tucker v. Alexandroff* (1901), 183 U.S., 424. For instances in which treaties have been interpreted by the Courts, see cases cited in *Phillimore's Intern. Law*, ii., 125 (2nd ed.); also *Ex parte Marks*, 15

N.S.W.L.R., 179; *Ex parte Rouanet*, 15 N.S.W.L.R., 269; 11 W.N., 55; *National Starch Manuf. Co. v. Munn's Patent Maizena Co.*, 13 N.S.W.L.R. Eq., at p. 116. The Court will take judicial notice of a treaty contained in Order in Council; *R. v. MacDonald*, 11 Q.L.J., 85. A treaty of extradition with a foreign State must be taken to be incorporated with and to limit the operation of Extradition Acts when any question of extradition from or to that foreign State is being considered; *Reg. v. Wilson*, 3 Q.B.D., 42.

To give jurisdiction under this section it is not necessary that rights should be created by the treaty; it is enough if they are protected by the treaty, from whatever course they may spring; *New Orleans v. De Armas*, 9 Pet., 224. In the case of *Owings v. Norwood's Lessee U.S.*, 5 Cranch., 344, the question was raised as to what was a case arising under a treaty? It was an action of ejectment between two citizens of Maryland, respecting land in that State; and the defendant set up an outstanding title in a British subject, which he contended was protected by the British treaty of 1794. . . . The Supreme Court of the United States held that not to be a case within the appellate jurisdiction of the Court, because it was not a case arising under the treaty. The treaty itself was not drawn in question, either directly or incidentally. The title in question did not grow out of the treaty, and as the claim was not under the treaty, the title was not protected by it; and whether the treaty was an obstacle to the recovery, was then a question exclusively for the State Court.—*Kent, Comm.* 1, 325-6.

Whether a treaty with a foreign sovereign has been violated, and whether a particular stipulation of a treaty has been voluntarily withdrawn by one party so as to render it no longer obligatory on the other are not judicial questions; *Chinese Exclusion Case*, 130 U.S., 581. But a treaty may be the foundation of a private right, and then it does become a subject of judicial action as does any other private right; *Miller's Const. of U.S.*, p. 322; *United States v. Rauscher*, 119, U.S., 407. The question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and it is not within the province of the Court to interfere with the conclusions of the political department in that regard; *Terlinden v. Ames* (1901), 184 U.S., 270.

The Court will inquire into the exercise of the prerogative of the Crown with respect to treaties. "A treaty may contain provisions which are *ultra vires* of the prerogative, in part valid and operative and in part invalid and inoperative. A treaty is, indeed, not necessarily void by reason of the infraction of some of its conditions though it may be voidable; and the validity of it cannot be challenged, generally speaking, by any private person; but a Court of justice when called upon to execute the provisions of a treaty may, at the instance of the subject, who is affected by them, examine whether those provisions are such as to be capable of legal enforcement." *Per* Sir Robert Phillimore.—*The Parliament Belge*, 4 P.D., at p. 152. Reference is there made also to the various kinds of treaties requiring parliamentary sanction.

The right of foreign corporations to carry on business in England without authority from Parliament remains unquestioned (*Westlake Private International Law*), yet treaties have been made with other countries granting companies "commercial, industrial, or financial" the "power of exercising all their rights and of appearing before the tribunals, whether for the purpose of bringing an

action or for defending the same throughout the dominions and possessions of the other power subject to the sole condition of conforming to the laws of such dominions and possessions," Art. I. Anglo-French Convention, 1862 (*Encyclopedia of Laws of England*, Vol. III., p. 438).

For any violation of a treaty not coming within the judicial cognizance, redress can be sought only through the channel of diplomatic representation. So far as British colonies and dominions are concerned the procedure in such cases was recently laid down in a most explicit manner by Mr. Secretary Chamberlain in the case of the Dutch ship *Vondel*. The owners of this ship complained to the British Government that the State Government of South Australia had declined to arrest the crew of the ship whilst she was in South Australian waters. The Secretary of State brought the complaint under the notice of the Governor-General of Australia. The Federal Government forwarded the papers to the State Government desiring them to furnish a report on the case. The State Government refused to report to the Federal Government on the ground that the latter had no jurisdiction in the matter. The Constitutional issues raised by the action of the South Australian Government were dealt with at length in two important despatches from the Secretary of State to the Lieutenant-Governor of South Australia, dated 25th November, 1902, and 15th April, 1903, in which Mr. Chamberlain indorsed the views of the Federal Ministers. "So far as other communities in the Empire or foreign nations are concerned," wrote Mr. Chamberlain, "the people of Australia form one political community for which the Government of the Commonwealth alone can speak, and for everything affecting external States or communities, which takes place within its boundaries, that Government is responsible. The distribution of powers between Federal and State authorities is a matter of purely internal concern of which no external country or community can take any cognisance. It is to the Commonwealth and the Commonwealth alone that, through the Imperial Government, they must look for remedy or relief for any action affecting them done within the bounds of the Commonwealth, whether it is the act of a private individual, of a State official, or of a State Government. The Commonwealth is, through His Majesty's Government, just as responsible for any action of South Australia affecting an external community as the United States of America are for the action of Louisiana or any other State of the Union. The Crown undoubtedly remains part of the Constitution of the State of South Australia, and in matters affecting it in that capacity, the proper channel of communication is between the Secretary of State and the State Governor. But in matters affecting the Crown in its capacity as the central authority of the Empire, the Secretary of State can, since the people of Australia have become one political community, look only to the Governor-General as the representative of the Crown in that community. The view of your Ministers would, if adopted, reduce the Commonwealth to the position of a Federal League, not a Federation, and appears to me to be entirely opposed not only to the spirit but to the letter of the Act."

(b) "**Affecting Consuls or Representatives of other foreign countries.**"—The High Court has original jurisdiction to entertain suits "affecting Consuls and other representatives of other foreign countries." This jurisdiction is, in the Constitution, bracketed with that giving jurisdiction to deal with suits between States. The evident purpose of the framers of the Constitution

was to open and keep open the highest Court of the Commonwealth for the determination, in the first instance, of suits involving a State, or a commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made; a provision, it will be seen, founded solely upon the character of the parties and irrespective of the subject-matter of the dispute. By the *Judiciary Act* the High Court is endowed with exclusive jurisdiction in matters between States, but a Consul is neither deprived of the privilege of suing in a State Court if he chooses, nor can he claim immunity from being sued there; *per* Waite, C.J., in *Ames v. Kansas*, 111 U.S., 449.

Consuls are commercial agents only; they are not diplomatic Representatives like Ambassadors. Ambassadors and public Ministers of foreign countries are exempt from both civil and criminal liability to the law courts of the country to which they are accredited; *Kent's Com.*, vol. I., p. 44; *Musurus Bey v. Gadban* (1894) 1 Q.B., 533; (1894) 2 Q.B. (C.A.) 352; *Westlake's Private International Law*, p. 232. Consuls partake of the ordinary character of commercial agents, and are subject to the municipal laws of the country where they reside. Though the functions of a consul would seem to require that he should not be the subject of the State in which he resides the practice of the maritime powers is quite unsettled on the point, and it is usual and thought most convenient to appoint subjects of the foreign country to be consuls at its ports; *ib.*, *supra*. As a general rule a consul is subject to the country in which he lives to the same extent as persons who are of like status as himself in all points except that of holding the consular office. It is agreed, however, that the official position of a consul commands some ill-defined amount of respect and protection; that he cannot be arrested for political reasons, that he must be conceded whatever privileges and exemptions are necessary to enable him to fulfil the duties of his office, except such as would withdraw him from the civil and criminal jurisdictions of the Courts.—*Hall's International Law* (4th ed.), p. 334.

The words of the Constitution, coupling consuls with "other representatives of other countries" seem to contemplate that jurisdiction shall only be conferred under this sub-section when the consul or other representative is affected in his official or representative capacity (see *Conv. Deb. Melb.*, p. 2,456). This construction is in harmony with the position of a consul as a public agent of the country which he represents. So far as his public position is concerned, the special protection of the federal jurisdiction is thrown over him; but where his public position is not affected there is no need to differentiate him from any ordinary citizen; *Quick and Garran's Annot. Const.*, p. 771. In the United States it has been held that an indictment for offering violence to the person of a public Minister is not a case "affecting" the Minister; *United States v. Ortega*, 11 Wheat., p. 469.

In the United States it was for a considerable time doubtful whether original jurisdiction in cases affecting consuls was exclusively vested in the Federal Courts, or whether the State Courts had concurrent jurisdiction; in *Davis v. Packhard*, 7 Pet., 275, the latter question was determined in the negative; see also *Born v. Preston*, 111 U.S., 252; but by subsequent legislation the State Courts are now at liberty to take jurisdiction of such suits. Under our Constitution, coupled with the *Judiciary Act*, the jurisdiction of the High Court in these matters is expressly made concurrent with that of the State Courts.

If a suit is brought against a consul in his own name the record shows that

the High Court has original jurisdiction. But suppose a suit is brought against his servant, or agent, by which the interest of the consul might be affected. In that case also the High Court would have jurisdiction; it would have it in all cases in which the consul is either a party to the suit, is directly interested in, or may be affected, or bound by the judgment; *Burgess's Pol. Sci.* 11, p. 329.

The phrase "other representatives of other countries" is somewhat vague, but would presumably include all persons officially accredited to the Commonwealth by foreign governments. The expression "other countries," occurs again in sec. 51, i., where trade and commerce "with other countries" means trade or commerce with persons outside the limits of the Commonwealth; but a representative of a country can hardly mean anything else than an accredited representative of the government of the country. The parallel expression in sec. 51 leads to the inference that the expression "other countries," in this section as in that, includes all countries outside the Commonwealth, whether British or foreign; *Quick and Garran's Annot. Const.*, p. 772.

(c) "**Commonwealth . . . is a party.**"—By this sub-section jurisdiction is given to the High Court to entertain suits in which the Commonwealth is either a plaintiff or a defendant: but under the Constitution, sec. 78, the jurisdiction is not completely defined until Parliament has made laws conferring rights to proceed against the Commonwealth in respect of matters within the limits of the judicial power. This has been done by the *Judiciary Act*, sec. 56, which enables any person to sue the Commonwealth in support of a claim founded either in contract or in tort. The Federal Parliament has thus conceded a much more liberal right of action against the Commonwealth than that conceded by Congress against the United States.

The first Court of Claims established in the United States by Congress for the purpose of adjudicating on certain classes of claims against the Government gave the Court jurisdiction to hear and determine all claims founded upon any law of Congress or upon any regulation of the Executive Department, upon contract express or implied with the Government of the United States. In *Nichols v. U.S.*, 7 Wall., 122, an action was brought to recover an excess of customs duty upon certain liquor which the plaintiff alleged had leaked out during the voyage and which consequently had never been imported into the United States. The plaintiff had paid the duty exacted but made no protest at the time; he subsequently sued for over payment. The Court held (1) the duty could not be recovered because it had not been paid under protest, and (2) that Congress did not intend to confer upon the Court of Claims jurisdiction in cases arising under revenue laws.

By the Tucker Act (24 Statutes at Large 505 and 359) the Court of Claims was vested with jurisdiction of all claims founded on the Constitution of the United States or any law of Congress except pensions or upon any regulations of the Executive Department or upon any contract express or implied with the Government or for damages liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States if the United States were suable. In *Hill v. United States*, 149 U.S., 593, the Court said that the United States could not be sued without their own consent and that they have never permitted themselves to be sued in any

Court for tort committed in their name by their officers; held that a claim for damages for the use and occupation of land under tide water for the erection and maintenance of a lighthouse, without the consent of the owner, not showing that the Government had acknowledged any right of property in the plaintiff against them, was a cause sounding in tort in which the Court had no jurisdiction. In *Dooley v. U.S.*, 182 U.S., p. 222, it was held that the Court of Claims had jurisdiction in an action for the recovery of duties illegally exacted upon merchandise alleged not to have been imported from a foreign country.—See also *Quick and Garron's Annot. Const.*, p. 772. As to liability of Commonwealth to be sued, see *Jud. Act*, sec. 56.

(o) **"Between States."**—The suability of a State without its consent has always been a thing unknown to British and American law; this has often been laid down by Courts and jurists; *Haus v. Louisiana*, 134 U.S., p. 1. It is inherent in the nature of sovereignty not to be amenable to an action at law without its consent; Hamilton in the *Federalist*, No. 81. The Constitution of the United States, like that of the Commonwealth, has given the Supreme Court exclusive original jurisdiction of suits between States, but both in America and Australia the suability of a State by a State is founded on express consent and acquiescence, first embodied in the draft Constitution and afterwards ratified by the people of the States. In America the suability of a State by a State in the Supreme Court has never been denied, but the liability of a State to be sued in that Court by a citizen of another State, affirmed in the case of *Chisholm v. Georgia*, 2 Dall., 419, was vehemently challenged, and the decision created such an uproar that it led to the Eleventh Amendment of the Constitution, which provides that the judicial power of the United States shall not be construed to extend to a suit against a State by a citizen of another State.

In America, before the Union, controversies between the colonies were at times submitted to the Courts for judicial solution; *Penn v. Lord Baltimore*, 1 Vesey, Sen. 444. Disputes as to boundaries of colonial territories were submitted to the King in Council. With the union of the States and the extinguishment of diplomatic relations between them it was considered by the founders of the Constitution necessary to establish a new forum for the settlement of controversies between States. Referring to this provision of the Constitution a distinguished writer says:—"The spectacle of a people submitting public controversies to the same mode of settlement as private law suits, and acquiescing in the decisions, has set an example which foreign nations are about to imitate, not only in internal discords, but in those which are international."—*Foster, Const. of the U.S.*, I., 45. "This power," says Story, "seems essential to the preservation of the Union. Some tribunal exercising such authority is essential to prevent an appeal to the sword and a dissolution of the Government. That it ought to be established under the national, rather than under the State Government, or, to speak more properly, that it can be safely established under the former only, would seem to be a position self-evident and requiring no reasoning to support it. It may justly be presumed that under the national Government, in all controversies of this sort, the decision will be impartially made according to the principles of justice, and all the usual and most effectual precautions are taken to secure this impartiality by confiding it to the highest judicial tribunal."—*Story, Comm.*, § 1681.

The Supreme Court of the United State has frequently declined to take jurisdiction in inter-State controversies, which, according to settled principles of public law, are not the subjects of judicial cognizance; *Hans v. Louisiana* (*supra*). The mere fact that the State is a plaintiff is not a conclusive test that the controversy is one in which the Supreme Court is authorized to grant redress against another State or its citizens; *Wisconsin v. Pelican Ins. Co.*, 127 U.S., 265.

The most numerous class of cases in which the Supreme Court of the United States has entertained suits between States has been that respecting disputed boundaries between States; *Iowa v. Illinois*, 151 U.S., 238. It has been held that the jurisdiction is not defeated because of the fact that in deciding the question the Court must examine and construe compacts between States, or because the jurisdiction affects the territorial limits of the political jurisdiction and sovereignty of the States; *Virginia v. West Virginia*, 11 Wall., 39; *Rhode I. v. Massachusetts*, 12 Pet., 657; and *Baker Annot. Const.*, p. 138.

The Law Reports contain few other cases in which the aid of the Court has been invoked in controversies between two States. The Court has declined to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their governments. Thus, in *Kentucky v. Dennison*, 24 How., 66, where the State of Kentucky, by her governor, applied to the Court in the exercise of its original jurisdiction for a writ of mandamus to the governor of Ohio, to compel him to surrender a fugitive from justice, the Court, while holding that the case was a controversy between two States, decided that it had no authority to grant the writ. And in *New Hampshire v. Louisiana* and *New York v. Louisiana*, 108 U.S., 76, it was adjudged that a State to whom, pursuant to her Statutes, some of her citizens, holding bonds of another State, had assigned them in order to enable her to sue on and collect them for the benefit of the assignors, could not maintain a suit against the other State in the Court. See also *Cherokee Nation v. Georgia*, 5 Pet. 1, 20, 28, 51, 75. In the case of *South Carolina v. Georgia*, 93 U.S., 4, the Supreme Court, through Mr. Justice Strong, left the question open whether "a State when suing in that Court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court;" and dismissed the bill because no unlawful obstruction of navigation was proved.—93 U.S., 14.

Under the words of this sub-section it has been held that in order to give jurisdiction it is not sufficient that a State is interested in a suit; a State may be even exclusively interested in a suit and yet it would not be a suit in which the State is a party within the meaning of the Constitution; *Bank of United States v. The Planters' Bank*, 9 Wheat., 904; *Osborn v. Bank of the United States*, 9 Wheat., 738.

"The phrases 'controversies between two or more States . . . between citizens of the same State claiming lands under grants of different States' seem to be unambiguous. The cases of suits between States have been mainly controversies as to conflicting boundaries. It has, however, been held that as the United States has no power to impose on a State officer as such, any duty whatever, and compel

him to perform it, a State cannot, by a suit against the governor of another State compel the performance of a duty by an officer of that other State, for there is no power delegated to the general government either through the judicial department or any other department, to use any coercive means to compel him; *Kentucky v. Dennison*, 24 How., 66"; *Federal Restraints*, p. 198; in *Osborne v. Bank of the United States*, 9 Wheat., 738, Marshall, C.J., said: "The eleventh amendment is of necessity limited to those suits in which a State is a party to the record," but he added "the State not being a party to the record, and the Court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether in the exercise of its jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal defendants." On the other hand he said "this suit is not against the State of Ohio within the view of the Constitution, the State being no party to the record"; *ib.*, 218.

The State of Pennsylvania, it has been held, has sufficient interest to sustain an application to the Supreme Court of the United States, in the exercise of its original jurisdiction, to maintain a bill in Chancery to compel by injunction the removal of obstructions from the Ohio. *Pennsylvania v. Wheeling Bridge Co.*, 18 How., 518; *Baker Annot. Const.*, U.S., 138.

This sub-section of our Constitution only confers a jurisdiction; it does not create a right of action where none previously existed; it does not extend the category of cases in which a State may sue or be sued; it merely enables certain suits, within the scope of the judicial power, to be brought into the High Court. By the Constitution, sec. 78, the Federal Parliament is authorized to make laws conferring rights to proceed against a State "in respect of matters within the limits of the judicial power." This limitation shows that no right of action against a State is conferred by the Constitution; the Parliament only can confer a right of action, subject to the condition that it must be within the limits of the judicial power—see *Quick and Garran's Annot. Const.*, notes to sec. 78.

By the *Judiciary Act*, sec. 58, any person making a claim against a State whether in contract or in tort, in respect of a matter arising under the Constitution or under a federal law can bring a suit against the State either in the High Court, if it has original jurisdiction, or in the Supreme Court of the State. By sec. 59 a State may sue another State in the High Court in respect of any claim arising under the Constitution, or under a federal law.

Referring to the corresponding provision in the Constitution of the United States, Mr. Justice Gray said: "The grant is of 'judicial power,' and was not intended to confer upon the Courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of the public and international law, be entertained by the judiciary of the other State at all." *Wisconsin v. Pelican Ins. Co.* (*supra*); *McClain Const. Law*, 694.

In a recent case it was held that the words "controversies between States" were intended to include something more than controversies over territory, but that the jurisdiction was of so delicate and grave a character that its exercise was not contemplated save when the necessity was absolute, and the matter itself properly justiciable. To maintain jurisdiction, the controversy must

arise directly between the States, and must not be a controversy in the vindication of grievances between private individuals. A bill by the State of Louisiana against the State of Texas, complaining that Texas by unnecessary and unreasonable quarantine regulations was intentionally and absolutely interdicting inter-State commerce, was held to be bad, as its gravamen was not a special and peculiar injury such as would sustain an action by a private person, but Louisiana presented herself in the attitude of *parens patriæ*, trustee, guardian, or representative of her citizens. Nor could the bill be sustained as a controversy between a State and the citizens of another State; *Louisiana v. Texas* (1899), 176 U.S., 1; *Quick and Garrau's Annot. Const.*, p. 775.

(e) "**Residents of different States.**"—By sub-sec. 4 the High Court has original jurisdiction of suits between residents of different States. This has not been vested exclusively in the High Court, but may be exercised by it concurrently with the several State Courts entrusted with Federal jurisdiction. This new judicial power and jurisdiction created by this sub-section may be considered from two points of view—(1) the extent and manner in which it establishes a new and national forum for the trial of inter-State law suits, a forum having authority to decide cases in which State influences, State interests, and State jealousies sometimes associated or assumed to be associated with the administration of State laws between residents of different States, might possibly be unfavourable to impartial justice; and (2) the extent and manner in which the new forum will facilitate, simplify, and cheapen the service and execution of process.

Federal authority to hear and determine controversies of this kind was embodied in the Constitution of the United States because it was thought desirable to invest the jurisdiction in an impartial tribunal, presided over by judges unconnected with either plaintiff or defendant. It was felt that it might sometimes happen that local feelings, sentiments, prejudices, or prepossessions may preclude a fair trial in the State Court, or at least give rise to fears or suspicions that such may be the case; *Cooley, Const. Law*, p. 139. "By securing recourse to an unbiassed and competent tribunal, the citizens of every State obtain better commercial facilities than they could otherwise count upon, for their credit will stand higher with persons belonging to other States if the latter know that their rights are under the protection, not of local and possibly prejudiced judges, but of Magistrates named by the national Government, and unamendable to local influence." *Bryce, Amer. Comm.*, 1st ed., vol. i., p. 314. "Local feeling was of course much stronger in America in 1787 when the Constitution was adopted than at present. Englishmen who had claims against American citizens failed to obtain their enforcement from 1783 till 1789, when the Federal Courts were established;" *ib.* The jurisdiction of the Federal Courts was not, however, made exclusive of the State Courts in these cases which involve the consideration only of State laws. It was considered proper to allow the suit to be brought in the first instance in a State Court, "because in most cases no such influences will be suspected or feared, and the parties would go to trial in the State Court without objection;" *Cooley, Const. Law*, p. 139. Accordingly it was provided by statute that causes between citizens of different States might only under certain circumstances be removed to Federal Circuit Courts.

The reason which influenced the framers of the American Constitution to federalise inter-State litigation never existed to any extent in Australia. There

was no marked antagonism between any of the Australian colonies, or their people, to warrant any fear that a resident of one colony could not obtain a fair trial if, as a plaintiff, he went to law in another colony against a resident thereof, or if, as a defendant, he had to submit to the jurisdiction of another colony. Considerations of convenience, facilitation of legal proceedings and the avoidance of circuitry of procedure, were the main justification of the inclusion of this sub-section in the new Constitution.

In pre-federation times there was a protracted controversy as to the power of the Courts of one colony, acting under colonial laws, to direct the service of its process against persons domiciled in another colony. The constitutionality of laws passed by colonial legislatures authorizing civil process issued within a colony to be served beyond the limits of a colony, was often questioned. Service, of course, is generally recognised as the foundation of jurisdiction in civil cases. No man can be legally bound by a judgment given behind his back and without his having had an opportunity of being heard. (*Per Erle, C.J., In re Brook*, 33 L.J., C.P. 246). Now, the Colonial Constitutions gave authority to the colonial legislatures to make laws for the peace, order, and good government of their respective colonies. Those legislatures were not sovereign, like the British Parliament; their powers were strictly circumscribed and defined by their respective Constitutions, and it was contended that whilst they could legislate concerning the service of process within their territorial limits, they could not, in the absence of an express grant of power from the Imperial Parliament, give their Courts jurisdiction over persons and property situated outside those limits. In several cases the Colonial Courts have been asked not to shrink from the responsibility of declaring void colonial legislative enactments which purported to apply to acts done by persons residing, and property located, outside the territorial limits. In most of these cases the Courts have refused to disregard the mandates of the legislative departments.—*Quick and Garran's Annot. Const.*, p. 614.

In *Banks v. Orrell* (1878), 4 V.L.R. (L.), 219, the question was raised as to the validity of the service in New South Wales of a writ of the Supreme Court of Victoria. By the *Common Law Procedure Act* 1865 (Vict.), sec. 90, it was declared that a writ of summons in any action might be served in any part of Victoria or within fifty miles of the frontier or border thereof. The Supreme Court held that every Act of the legislature must be obeyed, whatever its meaning. In *Reg. v. Call, ex parte Murphy* (1881), 7 V.L.R. (L.), 113, Chief Justice Stawell said: "It has always appeared to me to be the duty of the Court to assume that Parliament will not lightly attempt to exceed its territory." *Ib.*

By the *Judicature Act* 1883 (Vict.), sec. 90 of the *Common Law Procedure Act* was repealed, and provision, founded on sec. 18 of the *Imperial Common Law Procedure Act* 1852 (15 & 16 Vict., c. 76) was made for the issue of a writ of summons "on any defendant being a British subject residing out of the jurisdiction of the Court in any place;" and on proof that there is a cause of action which arose within the jurisdiction or in respect of the breach of a contract made within the jurisdiction or the breach within the jurisdiction of a contract wherever made or in respect of property within the jurisdiction, and that the writ has been personally served on the defendant, or that reasonable efforts were made to effect service, and that it came to his knowledge, the judge may allow the plaintiff to proceed in the action. There is a similar law in New South Wales

(*Common Law Procedure Act 1899*, sec. 18, *ib.*). See also Rules of Court, Oct. 10, 1900, Queensland, Or. 11. Compare also High Court Rules, Or. 8.

Another provision for the extra-territorial service of civil process, applicable to minor courts, has been made by several Australian legislatures. By the *Victorian Intercolonial Debts Act 1887*, re-enacted in the *County Court Act 1890*, secs. 142-4, authority is given to serve County Court summonses on defendants out of the jurisdiction, in Australian Colonies, in which there are laws in force by which effect may be given by the local Courts to the judgments of the County Court of Victoria. On recovering judgment against an absent defendant, within any of the reciprocating provinces or colonies, the plaintiff is enabled to procure a certificate of judgment; this certificate is sent on to the clerk of the local Court of the other colony in which the absent defendant is resident, and in which execution is then issued. Similar and reciprocal Acts were passed in South Australia (*Intercolonial Debts Act 1887*), and in New South Wales (*Intercolonial Debts Act 1899*).

The ineffectiveness of this kind of legislation, and the necessity of a federal law regulating service of process and execution of judgment, has been recently illustrated in a striking manner in the case of *Elkan v. De La Juvény*, decided by the Full Court of Victoria on the 10th August, 1900 (22 A.L.T., 34).

The New Zealand Parliament passed an Act (New Zealand Code, 46 Vict., No. 22, r. 53), authorizing the Courts of that colony, in any action founded on a contract made or to be performed within the colony, to decide whether they will allow a plaintiff to issue a writ and proceed against an absent defendant without service of the writ. In *Ashbury v. Ellis* (1893), App. Cas. 339, the Privy Council held that this was a valid law, and that it was competent for the legislature of New Zealand, under the Constitution of that colony, to subject to its tribunals persons who were neither by themselves nor their agents present in the colony, in actions founded on any contract made or entered into or wholly or in part to be performed within the colony. Referring to the argument that a judgment so obtained could not be enforced beyond the limits of New Zealand, their lordships said that "when a judgment of any tribunal comes to be enforced in another country, its effect will be judged by the Courts of that country with regard to all the circumstances of the case. For trying the validity of New Zealand laws, it is sufficient to say that the peace, order, and good government of New Zealand are promoted by the enforcement of the decrees of their own Courts in New Zealand." *Id.*, p. 344.

In reference to the question will foreign Courts recognize judgments obtained in civil Courts against defendants absent from the law making country, it was decided in *Simpson v. Foggo*, 32 L.J., Ch. 249, that the same rules are applicable in the enforcement of colonial judgments as in the enforcements of foreign judgments. In *Buchanan v. Rucker*, 9 East, 192, the facts were, that a law of the island of Tobago, a British colony, enacted that if a defendant were absent from the island he might be summoned by nailing up a copy of the declaration at the Court House door, and this should be deemed good service. Lord Ellenborough, C.J., held that this must be intended to apply to one who had been present and subject to the jurisdiction; and that if it had been meant to reach strangers to the jurisdiction, it would not have bound them. The principle affirmed was that

an action is not maintainable on a colonial judgment unless it appears that the defendant was regularly served with process, and had an opportunity of defending the suit, even although it appears to be the practice of that Court not to give personal notice. The rule to be deduced from the cases is, that where the defendant against whom a judgment has been obtained in a colonial Court, under such local Acts as we have been considering, authorizing service of process *in absentem*, is or even has been, subject to the jurisdiction of the colony, such judgment will be recognized in the Courts in England where otherwise it would not be; *Lefroy, Leg. Pow. in Can.*, p. 332.

Provision has been made by the various States to enable memorials of judgments obtained in the Supreme Court of one State to be filed in that of another and to allow execution to issue, *e.g.* 19 Vict. No. 12, sec. 3 (N.S.W.). *Inter-State Debts Recovery Act* 1901 (N.S.W.); for practice thereunder see *Rolin and Innes' Supreme Court Practice*, p. 242; *Common Law Practice Act* 1867 (Q.), s. 22; the *Supreme Court Act* 1890 (Vic.), sec. 182. The Federal Council also enacted the *Australasian Civil Process Act* 1886 to enable service of process issued out of the Supreme Court of one colony in another, and the *Australasian Judgments Act* 1886 so as to make provision for the enforcement within the federation of judgments of the Supreme Courts of the colonies of the federation. The latter Act received construction in the following cases—*Unmack v. Rider*, 19 A.L.T., 11; *McArdell v. McMeckan*, 18 A.L.T., 154; *Hooley v. Luke*, 18 A.L.T., 178; *Fourchard v. Trevor*, 21 A.L.T., 31; *Donald v. Donald*, 9 Q.L.J., 211; *Gray v. Fraser*, 8 Q.L.J., 11; *Alfred Shaw & Co. Ltd. v. Drake*, 8 Q.L.J., 12.

Such was the state of the law when the Constitution of the Commonwealth came into force authorizing the Federal Parliament to pass laws with respect to the service and execution throughout the Commonwealth of civil and criminal process and the judgments of the Courts of the States.

By the *Commonwealth Service and Execution of Process Act* 1901 writs of summons issued out of any Court of record of a State may now be served on the defendant in any other State. Service may be effected in the same manner as if the writ were served on the defendant in the State in which it is issued. The Act does not confer on any Court jurisdiction to hear or determine any suit which it would not have jurisdiction to hear and determine if the writ of summons had been served within the State. If the defendant does not enter an appearance the plaintiff is required as a preliminary to the exercise of jurisdiction to prove—(1) that the writ was served personally; or in the case of a corporation, that it was served on its principal officer; or (2) that reasonable efforts had been made to effect personal service, and that it had come to the defendant's knowledge. Plaintiff must also prove that the cause of action or the subject-matter of the action arose within the State in the Court of which the action is proceeding.

Provision is made in the same Act for the execution in one State of a warrant issued by any Court or Judge or Justice of the Peace of another State for the apprehension of any person (sec. 18), and a writ of attachment issued by a Court of record of a State or a Judge thereof for contempt of the Court or for disobedience of an order against any person in one State may, by leave of a Justice of the High Court or a Judge of the Supreme Court of any other State, be executed in such other State (sec. 19). The exercise of the discretion with respect to the issue of a

writ of attachment under this section is judicial, and must be exercised on definite principles. An application for leave to execute in Queensland a writ of attachment issued by the Supreme Court of New South Wales for disobedience of an order of that Court for the payment of money was refused; *Lewis v. Lewis* (1902) S.R. (Q.), 115. A judgment in a suit by any Court of record of any State may, on production of a certificate of such judgment, be registered in another State, and thereupon becomes a record of the Court in which it is registered, and has the same effect as a judgment of that Court, and like proceedings may be taken to enforce it as if it had been a judgment of the Court (sec. 20). In Victoria it has been held that where a foreign judgment is registered under this Act the Court cannot compel the judgment debtor to be examined under the *Imprisonment of Fraudulent Debtors Act* 1890; *McNamara v. Miller*, 28 V.L.R., 327.

The Constitution, section 75 (iv.), now enables a person residing in one State to sue in the High Court a person residing in another State, obtain judgment and issue execution against him without the intervention of a State Court, or a State Sheriff. By the *Judiciary Act*, sec. 39, the same jurisdiction may be exercised by State Courts sitting in federal jurisdiction.

The word "resident" is undefined, and must be interpreted according to the scope and spirit of the Constitution. There are numerous English and colonial cases defining "residence" differently for the purpose of different enactments; see cases cited under sec. 6 (2) of the *High Court Procedure Act*. Thus where residence is required for an electoral qualification, the guiding principle is that a voter should have some local interest; *Beal v. Ford*, 3 C.P.D. at p. 78. Where jurisdiction depends upon the residence of the defendant (as in County or District Court Acts) the principle is that of seeking out the defendant in his own jurisdiction—in the *forum rei*. Here the considerations are somewhat different from both; the principle is that of providing a *forum* which is neither solely the plaintiff's nor solely the defendant's, but belongs impartially to both. The object of the jurisdiction, in fact, is to avoid any suggestion of partiality which might arise if a litigant with a resident in another State has no option but to resort to the courts of that State. The jurisdiction is thus based on the existence of those local citizenships and local patriotisms which are characteristic of a federation. Residence in a State, for the purpose of this section, should be interpreted as involving a suggestion of State membership, and perhaps even of domicile.—*Quick and Garran's Annot. Const.*, 776.

It appears then that the residence in a State contemplated by the Constitution is such residence as, if combined with British nationality, would constitute citizenship of the State in the general sense of the term. It is not meant by this that the residence should be such as is required by the laws of the particular State for the exercise of any political franchise, but merely that it should be of a character to identify the resident to some extent with the corporate entity of the State. *Ib.*

All the Constitution demands is that the parties to the suit shall be citizens of different States; that on one side they shall be citizens of one State, and on the other side they shall be citizens of some other State—*Curtis, Jurisd. of the U.S.*, p. 134. What constitutes "residence" was discussed in *Rivers v. Bradley*, 53 Fed Rep. 305. "It must very often happen that suits are brought by person

who act in a representative capacity as executors, or administrators, or guardians, or trustees. It is settled that evidence that they act in a representative capacity and that those whom they represent would not be competent of themselves to sue, does not affect the jurisdiction of the Court. If an executor is a citizen of the State of Massachusetts, although every person whom he represents is a citizen of some other State, he may sue as a citizen of Massachusetts;” *Coal Company v. Blatchford*, 11 Wallace, 172; *Curtis*, p. 138. “A Court having competent jurisdiction over the suit does not lose it by a change in the citizenship of the party;” *Curtis*, p. 140. “When the jurisdiction has once attached it is not defeated by any change either in the domicile of the party who has brought the suit, or by his decease, and the coming in of an executor or administrator who would not have been capable of suing. As, for instance, a citizen of Massachusetts brings a suit in the Circuit Court of Massachusetts against a citizen of Rhode Island, and after the suit is brought, while it is pending in Court, the citizen of Massachusetts moves to Rhode Island, that does not defeat the jurisdiction.” *Curtis*, 139.

If a resident of one State changes his domicile to another State, with a *bona fide* intention to reside there, even though his object was to avail himself of the federal jurisdiction, he may sue as a resident of the latter State. *Jones v. League*, 18 How., 76; Kent. Comm. i., 345. But a merely colourable conveyance will not give jurisdiction. *Ib.*—*Quick and Garran’s Annot. Const.*, p. 777.

The residence necessary to give jurisdiction to the Court must be averred on the record, and a failure to make this averment is fatal, at any stage of the case, to the jurisdiction. That has frequently been decided. *Smith v. Atchison &c. R.R. Co.*, 64 Fed. Rep. 1; *Curtis*, p. 141.

“The Federal Courts possess no powers except such as the Constitution and Acts of Congress concur in conferring upon them, and the legal presumption is that every cause is without their jurisdiction, until and unless the contrary affirmatively appears.” *United States v. Southern Pacific Ry. Co.*, 49 Fed. Rep., 297; see also *Mexican Central Railway Co. v. Pinkney*, 149 U.S., 194; *Curtis*, p. 142.

Under the corresponding provision of the American Constitution, it has been held that the Federal Courts and the State Courts have a concurrent jurisdiction in all cases between the citizens of different States, whatever may be the matter in controversies, provided it be one for judicial cognizance.

The phrase, controversies “between citizens of different States,” vests in the Courts of the United States jurisdiction over all proceedings *in personam*, between such parties. Marshall, C.J., said in *Cohens v. Virginia*, 6 Wheat., 378: “If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.” Field, J., said in *Gaines v. Fuentes*, 92 U.S., 18: “It rests entirely with Congress to determine at what time the power may be invoked, and upon what conditions.” But that jurisdiction which is dependent on the character of the parties does not include proceedings *in rem.* or *quasi in rem.* such as questions of probate (*Fouvergne v. New Orleans*, 18 How., 470) or actions for divorce (*Barber v. Barber*, 21 How., 582). *Patterson’s Fed. Restraints on State Action*, p. 197.

An executor administrator trustee's guardian or receiver residing in one State, may sue a resident of another State, accordingly as his own residence does or does not permit him to do so, not the residence of those whom he represents. *Armoury v. Armoury*, 95 U.S., 187. As to what constitutes residence, see *Rivers v. Bradley*, 53 Fed. Rep., 305.

One of the most important and difficult questions in connection with the administration of this branch of the judicial power dealt with by the Federal Courts of the U.S. during the last quarter of a century was the federal jurisdiction over corporations. It was held in some early cases that a corporation aggregate was not, in its corporate capacity, a citizen, and that its right to sue in the Federal Courts depended on the citizenship of its members, which must be averred on the record. *Hope Ins. Co. v. Boardman*, 5 Cranch., 57; *Bank of U.S. v. Deveaux*, 5 Cranch., 61. These decisions were reviewed and overruled in *Louisville R. Co. v. Letson*, 2 How., 497, where it was held that a corporation created and doing business in a State is an inhabitant of the State, capable of being treated as a citizen for all purposes of jurisdiction. And the mischief of the earlier decision is now whittled away by a legal fiction; the members of a corporation being conclusively presumed, for purposes of jurisdiction, to be citizens of the State in which the corporation was created. *Steamship Co. v. Tugman*, 106 U.S., 118; *Memphis, &c., R.R. Co. v. Alabama*, 107 U.S., 581; Kent Comm. I., 346. It is well settled that a corporation created by a State is a citizen of the State, within the meaning of those provisions of the Constitution and Statutes of the United States, which define the jurisdiction of the Federal Courts. *Wisconsin v. Pelican Ins. Co.*, 127 U.S., p. 287.—*Quick and Garrai's Annot. Const.*, p. 771.

A corporation may clearly be a resident within the meaning of this section. "Residents" are resident persons, and by the (Imperial) *Interpretation Act 1899* (which governs this Constitution), the expression "person" unless the contrary intention appears, includes any body of persons corporate or unincorporate (sec. 19). *Ib.*, p. 777. As to corporations, generally, see *Foster's Federal Practice*, §19, p. 66. As to controversy between citizens of different States, see *Foster's Federal Practice*, §18, p. 63.

A resident of one State may bring an action in the High Court against a resident of another State in any matter. The State Courts have jurisdiction of a like nature under the conditions prescribed by law in each State. In each case the law applicable to the action, whether in contract or in tort, is determined by the Court in which the action is brought. These rules are found in the text books on private international law; *Dicey, Conflict of Laws*; *Westlake's Private International Law*.

The High Court in such suits will have to determine the law applicable on almost the same rules, subject to such legislation as may be passed by the Parliament of the Commonwealth. Much of the diversity of law will be altered by the legislation to be passed under the Constitution, sec. 51, and dealing with such matters as trade and commerce, banking, insurance, bills of exchange, promissory notes, bankruptcy and insolvency, trading corporations, marriage, and divorce.

(f) "**Writs of Mandamus or Prohibition or Injunction against an officer of the Commonwealth.**"—By this sub-section it is within the original jurisdiction of the High Court to deal with proceedings in which extra-

ordinary remedial writs are sought against officers of the Commonwealth engaged in carrying out provisions of the Statute law.—Conv. Deb. Melb., pp. 1876-85. In these cases the jurisdiction is founded on the writ, and all that it implies in law, as well as on the character of the party against whom it is applied for. If a writ, such as a mandamus, is sought against an inferior Court it is an exercise of appellate jurisdiction, and the High Court can only act if the matter comes within the scope of its appellate jurisdiction. On the other hand if the mandamus is sought against a non-judicial officer it is an exercise of original jurisdiction, and the High Court can only act if the matter comes within the scope of its original jurisdiction.

The mandamus provided for in this sub-section is only against "officers of the Commonwealth." Without express words the High Court would have original jurisdiction to issue a mandamus against any person, corporation, or public officer, coming within the scope of its original jurisdiction. It would also have the power to issue a mandamus to any State, or Federal Court in any matter connected with its general appellate jurisdiction. This sub-section merely gives jurisdiction; it does not confer any right to a mandamus in cases where a right did not exist before. Consequently where a mandamus is sought against an officer of the Commonwealth the jurisdiction must be read and applied in the light of established legal authority and recognized legal principles and usages.

For some acts or omissions on the part of a public officer there may be no civil responsibility to the law courts, but for others there is. The rule which is clearly laid down in English, Colonial, and American cases is this—that a mandamus will lie against an officer of the Commonwealth to compel him to perform an act which he is under a statutory or other legal duty to perform; but it will not lie to compel him to perform an act in which he has any discretion, or in which he is subject to the commands of the Crown. In *Regina v. Lords Commissioners of the Treasury*, L.R., 7 Q.B., 387, it was held that no mandamus lies to the Lords of the Treasury to compel them to issue a Treasury minute authorizing the payment of certain money. When, by a special statute or otherwise, a mere Ministerial duty is imposed upon the executive officers of the Government, that is a service which they are bound to perform without further question, then, if they refuse, the mandamus will be issued to compel them. *U.S. ex relat. Dunlap v. Black*, 128 U.S., 40. The writ goes to compel a party to do that which it is his duty to do. It neither creates nor confers new authority upon the officers to whom it is directed. It merely commands the exercise of existing powers. It should be issued to those who are to execute it, or whose duty it is to do the thing required. It must also clearly appear that the person to whom it is directed has the absolute power to execute it, otherwise it will not be issued. *Turnbull v. Giddings*, 95 Michigan, 314; *Brownsville Commissioners v. Loague*, 129 U.S., 495. In *Ex parte Gibson*, 2 N.S.W.L.R. 202, the Supreme Court of New South Wales held that a mandamus would lie against the Colonial Treasurer for the issue of a licence under the *Licensing Act 1862* on the ground that the Act left the Treasurer no discretion. Where a public officer refuses to perform a mere ministerial duty mandamus is the proper remedy; *Roberts v. United States*, 176 U.S. 221; *R. v. Registrar-General*, 1 S.C.R. (Q.), 201. If an executive officer is charged with a purely ministerial duty involving the exercise of no discretion on his part, the Courts may compel his performance of it; *Kendall v. United States*, 12 Pet., 524. The Court, how-

ever, will not grant a *mandamus* against a person who is an inferior ministerial officer; *R. v. Heeney*, 1 S.C.R. (Q.), 197.

If a duty be imposed upon a public officer, for the benefit of private individuals, any one prejudiced by his neglect to perform that duty could apply to the Courts to compel him to act according to law, or in the alternative to sue to recover damages for the neglect. Where, however, the duty imposed upon the officer is of an exclusively public nature his failure to perform it can only be punished by some proceeding instituted by the proper public authorities, or by his dismissal from office. The difference between a duty to the public generally and a duty in which private individuals are privately interested may be illustrated by cases arising under the postal laws, and under the customs laws. The Postmaster General has duties to perform, which are of high importance to the nation and to all its people; but they are public duties exclusively, and he never becomes charged with obligations to any particular person, so as to be liable to individual actions. *Lane v. Cotton*, 1 Ld. Raym., 646; s.c. 12 Mod., 472, and 1 Salk., 17; *Smith v. Pouditch*, Cowp., 182; *Rowning v. Goodchild*, 2 W.Bl., 906; *Whitfield v. Le De Spencer*, Cowp., 754, 765. It is different with a local postmaster. When mail matter is received at his office, directed to a particular person, it becomes his duty to that person to deliver it on demand, and he is liable to a suit for damages in case of refusal. *Teall v. Felton*, 1 N.Y., 537; s.c. in error, 12 How., 284. "A like distinction exists between the duties of the Secretary of the Treasury and the collector of the customs at a port; the former is responsible only to the government for the faithful performances of duty; but the latter owes duties to those whose imported goods pass through his hands, and he may become liable to private suits for oppressive conduct and illegal charges. *Barry v. Arnaud*, 10 Ad. & El., 646. So the duties of the United States marshal, which resemble those of the sheriff, are to a large extent duties to individuals, and may frequently subject him to suits. So any federal officer may become involved in private suits on allegation that, in the pretended discharge of duty, he has trespassed on the rights of third parties." *Cooley, Prin. Const. Law*, p. 140.

In the case of *Cunningham v. Macon and Brunswick Rail. Co.*, 109 U.S., 446, Mr. Justice Miller reviewed three classes of cases in which the Courts had sustained actions and granted remedies against public officers at the suit of private individuals. In the first class of such cases public property was held in the name of private individuals, and the title to the same was brought before the Court which, in the regular course of judicial administration, proceeded to discharge its duty in regard to that property. Another class of cases was, where an individual was sued in tort for some act injurious to another in regard to person or property, to which his defence was that, he had an authority under the orders of the Government. A third class was, where the law imposed upon an officer of the government a well-defined duty, in regard to a specific matter not affecting the general powers or functions of the government, but in the performance of which one or more individuals had a distinct interest capable of enforcement by judicial process; of this class were writs of *mandamus* to public officers, as in *Marbury v. Madison*, 1 Cranch., 137. "But in all such cases from the nature of the remedy by *mandamus*, the duty to be performed must be merely ministerial, and must involve no element of discretion to be exercised by the officer. It has, however, been much insisted on that in this class of cases where it should be

found necessary to enforce the rights of the individual, a Court of Chancery may by mandatory decree, or by an injunction compel the performance of the appropriate duty, or enjoin the officer from doing that which is inconsistent with his duty and with plaintiff's rights in the premises." *Per* Miller, J., in *Cunningham v. Macon, &c.* (*supra*).

This sub-section has been inserted in the Constitution to make sure that the original jurisdiction of the High Court included such a case as that of *Marbury v. Madison*, *supra*. The Constitution of the United States gives original jurisdiction to the Supreme Court only in cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. With respect of the residue of the judicial power the Constitution says that, "the Supreme Court shall have appellate jurisdiction only." The rest of the original judicial power can be vested by Congress only in such inferior Federal Courts as it creates. The *Judiciary Act* 1789, after declaring that the Supreme Court should have appellate jurisdiction from the Circuit Courts and Courts of the several States, went on to provide that it should have power to issue writs of mandamus in cases warranted by the principles and usages of law "to any courts appointed or persons holding office under the authority of the United States." In the case of *Marbury v. Madison* the facts were that the plaintiff had been duly appointed a Justice of the Peace and his commission had been signed and sealed by the retiring President, but the Secretary of State (Madison), for the new President, neglected or refused to issue it; Marbury applied to the Supreme Court for a writ of mandamus to compel the Secretary to issue the Commission. The Supreme Court held that the *Judiciary Act*, so far as it purported to give it power to issue a mandamus against an officer of the United States, a proceeding which involved the exercise of original jurisdiction, was unconstitutional, as it did not come within the cases of original jurisdiction conferred upon the Court by the Constitution. The Court held that Madison's omission was a violation of a vested legal right for which the plaintiff was entitled to a remedy by a mandamus, but it also held that it could not legally issue the mandamus.

But although the Congress could not confer on the Supreme Court additional original jurisdiction not authorized by the Constitution to grant a writ in this case, it could, as it did, legally give inferior Federal Courts original jurisdiction in matters arising under federal laws, in the exercise of which those Courts are competent to grant writs of mandamus to compel the performance of a ministerial duty which is not of a discretionary kind; *Kendall v. United States*, 12 Pet., 524; see other cases collected *Cooley's Principles of Constitutional Law*, p. 121.

In the absence of this sub-section of our Constitution the decision in *Marbury v. Madison* would be applicable, and the High Court would not have been competent to issue a mandamus against a non-judicial officer of the Commonwealth, excepting in cases in which it was specially authorized by special Federal Acts giving it original jurisdiction to do so. The principle is that the original jurisdiction of the High Court, like that of the Supreme Court of the United States, is limited, and that its power to grant a mandamus, prohibitions, injunctions or any other remedy whatever, is ordinarily restricted so far as that remedy involves an exercise of original jurisdiction within precisely the same limits as the Supreme Court. The difference made by this sub-section is that, whenever any person seeks any one of these three extraordinary remedies against an officer of the Com-

monwealth the High Court will have original jurisdiction in the matter. It will have it whether or not it is a matter "arising under a treaty" or "affecting Consuls," or "between States," &c.—*Quick and Garraan's Annot. Const.*, p. 779.

There are, however, two classes of cases in which the writs contemplated by this sub-section do not apply, viz.: (1) To Crown and Commonwealth, and (2) to judicial and other officers.

CROWN AND COMMONWEALTH.—It is not intended by sub-section (v.) to allow the issue of writs against the Crown, or the Commonwealth, or against Ministers of State representing the Crown and the Commonwealth. Distinct and separate provision is made for legal proceedings against the Commonwealth. During the Convention Debates it was suggested that the words were unnecessary inasmuch as the jurisdiction proposed to be given was already covered by sub-section (iii.), which gave original jurisdiction "Where the Commonwealth, or a person suing or being sued on behalf of the Commonwealth is a party." *Conv. Deb. Melb.*, pp. 1879-82. It seems clear, however, that sub-section (iii.) only applies where the Commonwealth is a real party, and not where some person sues or is sued as representing the Commonwealth. An application for a mandamus could not be made against the Commonwealth, because a mandamus cannot issue against the Crown, or against any person representing the Crown. *Regina v. Lords Commissioners of the Treasury*, L.R., 7 Q.B., 387. "There can be no mandamus to the Sovereign; there would be an incongruity in the Queen commanding herself to do an act because disobedience to a writ of mandamus is to be enforced by attachment." Per Denman, C.J., *Regina v. Powell*, 1 Q.B., 361. A suit against "an officer of the of the Commonwealth" is a proceeding very different from a suit against "a person sued on behalf of the Commonwealth."

In *Ex parte Mackenzie*, 6 S.C.R. (N.S.W.), 306, the Supreme Court of New South Wales refused to grant a writ of mandamus against the Colonial Treasurer to compel him to issue a warrant for the payment of certain money voted by Parliament. In *ex parte Cox*, 14 S.C.R. (N.S.W.), 287, a mandamus against the Secretary for Mines commanding him to hand over a mineral lease executed by the Government under the *Mining Act*, was refused by the same Court on the ground that the Act did not impose any duty on the Secretary for Mines. The writ of mandamus cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment and discretion; *U.S. ex rel. Redfield v. Windom*, 137 U.S., 636, 644. In *Decatur v. Paulding*, 14 Pet., 497, it was held that a mandamus would not lie against the Secretary of the Navy to compel him to sign a warrant for the payment of money. No power can be asserted by the Supreme Court of the United States to command a withdrawal of money from the treasury to be applied in satisfaction of disputed claims against the United States; *U.S. ex rel. Goodrick v. Guthrie*, 17 How., 284. *Kent's Comm. I.*, p. 322.

JUDICIAL OFFICERS AND OTHERS.—The jurisdiction under sub-section (v.) must not be confounded with the jurisdiction which the High Court has, both original and appellate, in any matter legally before it to grant all remedies necessary, or appropriate for the exercise of that jurisdiction. Thus in a case in which the person against whom a mandamus or injunction is sought is not an officer of the Commonwealth, then, if the character of the parties, or the subject matter of

the suit gives the High Court jurisdiction in the matter it may grant any such writ or remedy as may be necessary for the complete exercise of that jurisdiction. The well recognized principle is that in the exercise of its lawful jurisdiction the Court may employ all appropriate methods and remedies. That principle is not affected by the fact that in a certain class of cases the nature of the remedy sought is itself made the ground of jurisdiction. The High Court could issue writs not specially provided for by statute which may be necessary for the exercise of its jurisdictions, and agreeably to the principles and usages of law. *Curtis Jurisd. U.S.*, p. 167.

MANDAMUS.—The nature and special use of this writ has been incidentally explained in the foregoing general discussion on sub-section (v.) which applies equally to the other special writs that may be granted against non-judicial officers of the Commonwealth. A mandamus only lies when the applicant has a legal right to the performance of some public duty and where there is no other adequate remedy. *Steph. Comm.*, 111, p. 615. *Shortt on Mandamus*, p. 223.

In the case of *Goldring v. Collector of Customs* (New South Wales), 9 Argus L.R., Current Notes, pp. 37-8, an application was made to the Supreme Court of New South Wales for a mandamus to compel the collector to sign entries for two parcels of watches referred to in warrants 886 and 896, or to state his reasons for refusing to do so, and why he should not either deliver up applicant's books, which were taken away by him under certain powers exercised by him under the Customs Act, or, in compliance with the requirements of the Act, give applicant certified copies for the purpose of enabling him to carry on his business. The dispute was entirely with regard to watches. The objection was taken on behalf of the defendant that the customs and excise having been transferred to the Federal Government, no officer of the Customs, any more than any officer of the Federal Executive, would be bound by any mandamus issued by the State Court. The Full Court held that the State Legislature and Government had nothing to do with the matter, and it was one entirely for the Federal Government; and that being so, the Court was of opinion that it had no power to grant a mandamus to compel the federal officer to discharge a duty which he owed to the Federal Government. The Court could not take upon itself to consider the question whether or not the collector was or was not doing his duty, because it was a matter entirely between him and the Federal Legislature or Federal Government that appointed him. He owed no duty to the State Government, and the Court had no power whatever to compel him to perform any duty. *Per Stephen, Acting C.J.*

As to the general principles governing mandamus to public officers and Federal officers in the United States, see also *Spelling's Extraordinary Relief*, 1893 ed., Vol. II., pp. 1188, 1202.

PROHIBITION.—A writ of prohibition issues out of a superior court of law and is directed to the judge of an inferior court, or the parties to a suit therein, or both conjointly, requiring that the proceedings which have been commenced therein be either conditionally stayed or peremptorily stopped. The object of the writ is the keeping of the Court to which it is directed within its proper jurisdiction, or to repress the assumption of authority by any pretended Court; *Broom Com. Law*, 9th ed., p. 221. See also *Blackstone Com. III.*, 112; *Shortt, Mandamus*, p. 426. The general rule is that prohibition only lies where the inferior tribunal acts

either without jurisdiction, or in excess of its jurisdiction, or where its procedure has violated the rules of justice (see *Shortt*, 436).

The writ of prohibition will issue not only to the regular Courts, but to various public bodies exercising powers of a judicial nature—such, for instance, as the Tithe Commissioners and the Railway Commissioners in England (see *Shortt*, p. 433). In a case relating to the Local Government Board, though the power to prohibit was not decided, Brett, L.J., observed:—"I think I am entitled to say this, that my view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons, other than to the superior courts, the power of imposing an obligation upon individuals, the Court ought to exercise as widely as they can the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament." *Reg. v. Local Government Board*, 10 Q.B.D., 321. But a prohibition will only be granted where the proceedings to be prohibited are of a judicial character. (*Shortt*, p. 439). Thus it may be argued that prohibition will lie against the Inter-State Commission when acting in its judicial capacity.

It would seem that a prohibition directed to the judge of an inferior Court is an exercise of appellate rather than of original jurisdiction, inasmuch as it involves the assumption of an authority to control and revise, in certain respects, the proceedings of the inferior Court. So it has been held in the United States that a writ of prohibition cannot issue from the Supreme Court where there is no appellate power given by law, nor any special power to issue the writ; *Ex parte Gordon*, 1 Black, 503. But whether a writ of prohibition be regarded as an original or an appellate proceeding seems immaterial under our Constitution.

INJUNCTION.—An injunction is a remedy of an equitable nature. It used to be a writ remedial issuing out of a Court of Equity, in those cases in which plaintiff is entitled to equitable relief, by restraining the commission or continuance of some act of the defendant; *Joyce on Injunctions*, p. 1. Injunctions are also issued in some cases by Courts of common law, acting on equitable principles. The writ of injunction is now generally abolished, injunctions being obtained by order; though the writ of injunction survives in the common law courts of those colonies where the old Common Law Procedure Acts are still in force. The necessity for the mention of injunctions here is not quite apparent. An injunction is on a different footing altogether from mandamus and prohibition; it is an ordinary remedy in private suits between party and party. It was probably added because of the analogy which exists, in effect, between a mandamus and an injunction.—*Quick and Garran's Annot. Const.*, 783.

The general rule in the United States governing the jurisdiction in equity against public officers is that equity will interpose in behalf of individuals to restrain all illegal and unauthorized acts by them under color and claim of official authority which tend to impair public rights, or will result in irreparable or serious injury to private citizens, or when preventive relief is necessary to prevent a multiplicity of suits. A Court of Equity only exercises its peculiar jurisdiction over public bodies and public officers to prevent a breach of trust affecting public franchises, or some illegal act under color or claim of right affecting injuriously the property rights of individuals; and to authorize the issuing of an injunction,

not only must a clear legal and equitable right to the relief demanded be shown, but it must also appear that such a breach of trust or illegal act is being done by defendant, or is threatened and imminent; *Spelling's Extraordinary Relief*, 1893 ed., Vol. I., p. 483. See the same authority as to the nature of the cases in which an injunction will be granted against public officers.

OFFICER OF THE COMMONWEALTH.—If a Minister of State refuses to perform a ministerial act intended by law to be for the benefit of private individuals an application for a writ under this sub-section would lie against him as an officer of the Commonwealth. Officers of the transferred department under sec. 84, and officers of the Executive Government mentioned in sec. 67, are clearly “officers” within the meaning of the sub-section. It is not so clear that Justices of the High Court are officers of the Commonwealth within its meaning. Parliament, in the exercise of power conferred by the Constitution, sec. 51 (xxxix.), to legislate in matters incidental to the execution of any power vested in the Federal Judicature, has conferred on the High Court express jurisdiction to grant writs directed to judges requiring them to perform their duties in the domain of federal judicial power; *Jud. Act*, sec. 33 (a).

(g) “**Any Matter Arising under this Constitution.**”—Matters arising under this Constitution are actions, claims, prosecutions, defences, or immunities, founded on rights and powers conferred, privileges granted, protection secured, or prohibitions contained, in the Constitution itself, independent of any particular statutory enactment; they are contra-distinguished from matters arising under laws made by the Parliament; *Story Comm.*, 1647. Thus if a person were charged with the offence of voting twice at a federal election in violation of the Constitution, secs. 8, 30; or if any unqualified person should sit in Parliament contrary to sec. 46; or if a State should coin money, or make paper money a legal tender contrary to sec. 115; or if a person, tried on indictment for any offence against the law of the Commonwealth, be denied the right of trial by jury granted by sec. 80; or if a question arose as to the right of an officer of a transferred department under sec. 84, as in the case of *Bond v. The Commonwealth* (1 C.L.R., 13); or if the Commonwealth were to impose any tax on the property of a State contrary to sec. 114; or if a religious test were required as a qualification for any office or public trust under the Commonwealth contrary to sec. 116; or if a subject of the King, resident in any State, should be subjected in another State to any disability, or discrimination in contravention of sec. 117, in these and many other cases the question to be judicially decided would be a matter arising under the Constitution.

In the leading American case of *Cohens v. Virginia*, 6 Wheat., 264, it was contended that a case only arose under the Constitution where the plaintiff relied on some provision in the Constitution to support his case; but the Court refused to adopt this narrow construction. Marshall, C.J., in delivering the judgment of the Court, said: “If it (the intention) be to maintain that a case arising under the Constitution, or a law, must be one in which a party comes into Court to demand something conferred on him by the Constitution, or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.” A case is one of federal cognizance whenever it becomes

necessary to construe the Constitution, laws, or treaties of the United States, or to decide as to the existence of some right, title, privilege, claim, or immunity asserted thereunder. *Cohens v. Virginia*, 6 Wheat., 264; *Starin v. New York*, 115 U.S., 248; *Wiley v. Sinker*, 179 U.S., 58. The case must turn in whole, or in part, upon the alleged federal question. It is not sufficient that "in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States;" *Gold-Washing and Water Co. v. Keyes*, 96 U.S., 199, 203; *Gableman v. Peoria &c. Ry. Co.*, (1900) 179 U.S., 339. A case arises under the Constitution of the United States when the right of a party depends on the validity of an Act of Congress; *Patton v. Brady* (1901), 184 U.S., 608.

If from the question involved in a suit it appears that some title, right, privilege, or immunity, on which the recovery depends will be defeated by one construction of the Constitution, or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution, or laws of the United States within the constitutional meaning of those expressions. *Ames v. Kansas*, 111 U.S., 249; *Starin v. New York*, 115 U.S. 248, 257. "When a proposition has once been decided by the Supreme Court of the United States, it can no longer be said that in it there still remains a federal question. More correctly it is said that there is no question, State or Federal." *Brewer, J. Kansas v. Bradley*, 26 Fed. Rep., 239, 290. See further as to suits arising under the Constitution; *Foster's Federal Practice*, p. 57, §17.

"Any matter involving its Interpretation."—By this portion of the sub-section Parliament has conferred original jurisdiction in the High Court in any matter involving the interpretation of the Constitution. It would seem, however, these words add little or nothing to the full meaning of the preceding words as construed by the Courts of the United States. It would be difficult to decide a case arising under the Constitution without interpreting the Constitution.

Sometimes the word "interpretation," as contrasted with "construction," is used in a narrow sense, to signify the process of explaining particular provisions in which there is some ambiguity; whilst "construction" is used to signify the process of comparing different parts of the document, and gathering the intent from a survey of the whole. In other words, "interpretation" is thus used in an analytic, and "construction" in a synthetic sense. (See *Story Comm.*, 39). The word "interpretation" is clearly used in the most general sense, as including both the analytic and the synthetic processes. But apart altogether from this sub-section, both State and Federal Courts have imposed on them the duty of interpreting the Constitution, which is the supreme law of the Commonwealth, in every case in which they have jurisdiction and in which rights and obligations arising under the Constitution are involved; and the High Court as the general appellate tribunal, has the duty of reviewing the interpretations of the State Courts; *Const.*, cl. 5; *Quick and Garran's Annot. Const.*, p. 791.

In the exercise of the duty of interpretation and adjudication, not only the High Court, but every Court of competent jurisdiction, has the right to declare that a law of the Commonwealth or of a State is void by reason of transgressing the Constitution. This is a duty cast upon the Courts by the very nature of the judicial functions. The Federal Parliament and the State Parliaments are not sovereign bodies; they are legislatures with limited powers, and any law which

they attempt to pass in excess of those powers is no law at all; it is simply a nullity, entitled to no obedience. The question whether those powers have in any instance been exceeded is, when it arises in a case between parties, a purely judicial question, on which the Courts must pronounce. This doctrine was settled in the United States in 1803 by the great case of *Marbury v. Madison*, 1 Cranch., 137, where it was held that the authority given by the *Judiciary Act* to the Supreme Court of the United States, to issue writs of mandamus to public officers, was not warranted by the Constitution. *Ib.*, p. 791.

The Supreme Court of the United States has asserted the power of the United States Judiciary to stand between the Constitution and the Legislature, and to pronounce an act of the Legislature null and void whenever it comes into conflict with such private rights or private property as, according to the interpretation placed upon the Constitution by the Judiciary, are guaranteed in that instrument. The Court, on the other hand, declines to claim any such transcendent power where the legislative act does not come in conflict with private rights or private property. Of course, the Court asserts the same power over against executive interference with private rights or private property. *A fortiori*, it claims the same power over against the acts of the States. The Court must itself determine when the case is one primarily affecting private rights or private property, and when, on the contrary, it is primarily a political question. The Court bases this position, in principle, upon the provision of the Constitution which vests in the Judiciary jurisdiction over all cases arising under the Constitution." *Burgess Political Sci.*, ii., 326-7; *Civil Rights Cases*, 100 U.S., 3; *Luther v. Borden*, 7. How., 1.

The following are some of the leading rules observed by the Courts of the United States in cases involving the interpretation of the Constitution: "The Federal Government can have no power which, on a reasonable construction of the whole Constitution, has not been given expressly or by necessary implication. But once it has been determined that the Federal Government has power over the subject matter, the scope of the power, and mode of giving effect to it, will receive a broad and liberal construction. The power of the Federal Legislature, though limited to specified objects, is plenary as to those objects." *Per Marshall, C. J., Gibbons v. Ogden*, 9 Wheat., 1. "It is not on slight implication and vain conjecture that the Legislature is to be pronounced to have transcended its powers and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." *Per Marshall, C. J., Fletcher v. Peck*, 6 Cranch., 87; and see *Commonwealth v. Smith*, 4 Binney (Penns.), 123. It is a settled rule that statutes which are unconstitutional in parts only will be upheld so far as they do not conflict with the Constitution, if the parts which are unconstitutional are separable. But this will not be done unless the valid and invalid parts are capable of separation so that each can be read by itself. If the unconstitutional part cannot be rejected without giving to the rest of the statute a meaning which was not contemplated, the whole statute is void. When a power comes within the reasonable intendment of one clause in the Constitution, an express gift of a portion of the power, in another clause, will not be taken to cut the power down by implication. "The exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not

granted—that which the words of a grant could not comprehend.” *Per* Marshall, C.J., *Gibbons v. Ogden*, 9 Wheat., p. 191; *Rhode Island v. Massachusetts*, 12 Pet. 657. The Court should look to the nature and objects of the power, in the light of contemporary history, and give to the words of the Constitution such operation, consistent with their legitimate meaning, as to fairly attain the ends proposed; *Prigg v. Pennsylvania*, 16 Pet., 539; *Gibbons v. Ogden*, 9 Wheat., 1. Consequently, though it is a general rule in the construction of statutes that extrinsic evidence, such as reference to the proceedings in Parliament, is not admissible to vary or add to the terms of a Statute (*Reg. v. Hertford College*, 3 Q.B.D., 693; *Richards v. McBride*, 8 Q.B.D., 119), it would seem that the Debates of the Convention, or other contemporary records, may be referred to as a guide to the construction of the Constitution.

Lord Davey, Debates in Imperial Parl., p. 99, speaking on the interpretation of the Constitution, remarked—“I have no doubt that the judges of the Australian Courts will approach the consideration of these constitutional questions in a large and statesmanlike spirit, and will treat this Act as it ought to be treated, more in the nature of a treaty for the purpose of reconciling conflicting interests.”

As it has been stated respecting the Government of the United States, so of the Government of the Commonwealth, it may be said that it was born of the Constitution, and that all the powers which it enjoys, or which it may exercise, must be either derived expressly or by implication from that instrument. “Ever then, when any act of any department is challenged because not warranted by the Constitution, the question of authority is to be ascertained by determining whether the power has been conferred by the Constitution, either in express terms, or by lawful implication to be drawn from express authority conferred, or deduced as an attribute which legitimately inheres in the nature of the powers given, and which flows from the character of the government established by the Constitution; in other words, whilst confined to its supreme orbit the Federal Government is supreme within its lawful sphere.” The Attorney-General of the United States in *Downes v. Bidwell*, 182 U.S., p. 244.

It has been held that in order to construe an Act it is not legitimate to invoke the aid of the Debates in Parliament in connection with the bill which afterwards became law, but that light may be thrown upon the construction of legislation by a knowledge of the history of a movement resulting in such legislation. In *the Taff Vale Railway v. Amalgamated Society of Railway Servants*, (1901) App. Cas., 435, counsel for the respondent referred to the Royal Commission on Trade Unions 1869. It was argued that the Act of 1871 was inspired by and founded on the Minority Report, which was signed by Lord Lichfield, Mr. Thomas Hughes, Q.C., and Mr. Frederic Harrison, and it was clear that the intention of that report was to avoid incorporation and the attendant liabilities; *Webb's History of Trade Unionism*. Lord Macnaghten, in giving judgment, said, p. 437: “If you take the report of the Royal Commission on Trade Unions, and turn to the statement accompanying the Minority Report to which Mr. Haldane referred, you will see that there was nothing on which the advocates of trade unions insisted more strongly than on the right of unions to employ the whole of their funds if they chose for the purpose of strikes and in connection therewith. ‘At present,’ say the authors of that statement, ‘the strength of the union, and the confidence of its members, simply consists in this, that it can, if so disposed, employ the whole of

its funds in the support of the trade ends.' An enforced separation of the funds of the union would be, they say, 'arbitrary interference with the liberty of association'—it would 'paralyze the efficiency of the institution.' The suggestion of such a proposal was 'tantamount to a proposal to suppress unionism by statute.'"

The use of the report of a Royal Commission was held by Darley, C.J., to be admissible only in construing a statute where there was an ambiguity; *Dixon v. Rogers*, 19 N.S.W.L.R. (L.), 33. In the case of *Reg. v. The Bishop of Oxford*, L.R. 4 Q.B.D., 525, Bramwell and Baggallay, L.J.J., *dubitante* Thesiger, L.J., allowed a speech of the Lord Chancellor in the House of Lords to be cited as an authority as to the construction of a statute. In *S.E. Railway Co. v. Railway Commissioners* (1880), 5 Q.B.D., 236, Cockburn, C.J., said: "Where the meaning of an Act is doubtful, we are, I think, at liberty to recur to the circumstances under which it passed into law as a means of solving the difficulty," and he accordingly proceeded to quote a speech by Mr. Cardwell on the introduction of the bill into the House of Commons and a speech made by the Lord Chancellor on introducing it into the House of Lords. But see *Julius v. Bishop of Oxford*, (1880) 5 App. Cas., 214. In *Pritchard v. Howard Smith & Sons Ltd.*, 4 Q.L.J., at p. 68, counsel, relying upon the authority of Denman, J., in *Castioni's Case* (1891), 1 Q.B., 155, quoted from a speech of a political authority as to the construction of a statute.

As to resorting to the contemporary interpretation of the Constitution of United States, and relying upon the opinions of members of the Conventions, see *Story*, pars. 405, 406; *Hare's American Constitutional Law*, pp. 1250, 1301.

For list of leading cases see *Quick and Garra's Annot. Const.*, pp., 794 to 796. See also *Story's Const.*, §397. For rules of interpretation of the Constitution of the United States, see also *Downes v. Bidwell* (1900), 182 U.S., 244.

31. The High Court in the exercise of its original jurisdiction (a) may make and pronounce all such judgments (b) as are necessary for doing complete justice in any cause or matter pending before it, and may for the execution (c) of any such judgment in any part of the Commonwealth direct the issue of such process, whether in use in the Commonwealth before the commencement of this Act or not, as is permitted or prescribed (d) by this or any Act or by Rules of Court.

Judgment and execution.

(a) "Original jurisdiction."—The intention of this section and sec. 32, *infra*, is that all matters in controversy between parties should be raised and determined in the one action. See notes to sec. 32 (*infra*). See sec. 30 (*supra*).

(b) "Judgments."—The judgments of the High Court have effect and may be executed throughout the Commonwealth; sec. 25 (*supra*).

(c) "Execution."—The process of the High Court has effect throughout the Commonwealth; sec. 25 (*supra*). As to execution against Commonwealth and States, see sec. 65, *et. seq.*; as to the remedies for enforcing a judgment in a State, see H.C.P. Act, sec. 26; as to interpleader, see H.C.P. Act, sec. 27.

Complete relief
to be granted.
Jud. Act 1873
s. 24 (7).

(d) "**Prescribed by rules of Court.**"—As to attachment and committal, see Or. 35; as to execution against partnership property, see Or. 36, r. 10.

32. The High Court in [the exercise of its original jurisdiction (a) in any cause or matter pending (b) before it, whether originated in the High Court or removed (c) into it from another Court, shall have power to grant and shall grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter; so that as far as possible all matters in controversy (d) between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters may be avoided.

(a) "**Original jurisdiction.**"—See notes to sec. 30 (*supra*).

(b) "**Pending.**"—"A cause is said to be pending in a Court of Justice when any proceeding can be taken in it." (*Per Jessel, M.R., Fordham v. Clagett*, 20 C.D., 653). A cause is still pending after final judgment if the judgment is not satisfied. (*Per Jessel, M.R., Salt v. Cooper*, 16 C.D., 551).

(c) "**Removed from another Court.**"—As to removal of causes, see (*infra*) Part VII., sec. 40 *et. seq.* This section applies only to cases in which the Court is exercising original jurisdiction; as causes arising under the Constitution or involving its interpretation and pending in any Court of State on appeal, can only be removed, it is difficult to see how this part of the section can have any practical application.

(d) "**All matters in controversy.**"—The tenor of this section, adapted from the *Judicature Act*, is to require all proceedings as far as possible to be taken in one action. *Per Cotton, L.J., Searle v. Choat*, 1884, 25 C.D., at p. 727: "Whenever a subject matter of controversy arises in an action which can conveniently be determined between the parties to the action, the Court should, if possible, determine it so as to prevent further and needless litigation." *Per Jessel, M. R., In re Tharp*, 1878, 3 P.D., at p. 81; *Hedley v. Bates*, 1880, 13 C.D., at p. 501: "The fundamental idea of the framers of those statutes is to be found in the *Judicature Act 1873*, sec. 24, sub-sec. 7." *Per Brett, M.R., McGowan v. Middleton*, 1883, 11 Q.B.D., at p. 468; *Manchester &c. Co. v. Brooks*, 2 Ex., 246. In the one action all matters in controversy regarding the cause of action or arising out of or connected with the cause of action should be raised and determined. Accordingly "every remedy necessary for doing complete justice in an action" is provided by this sub-section. (*Per Baggallay, L.J., Serrao v. Noel*, 1885, 15 Q.B.D., 559).

The sections of the *Judicature Act* enacting rules of substantive law are not reproduced in the *Judiciary Act*. When the High Court exercises its jurisdiction

in a case between a resident of one State, and a resident of another, it will then be necessary for it to determine what particular laws are applicable. So far as no law of the Commonwealth is applicable, the laws by which the rights of the parties are regulated will be determined according to the rules of private international law. These rules are to be found in the text-books of Dicey, Westlake and Foote. The section provides, however, that when such an action has been instituted, all legal and equitable claims properly brought forward may be determined. These rights will depend upon the particular State law applicable. The High Court is not a Court of Equity or a Court of Common Law; it is made a Court of complete jurisdiction. (*Per* Earl Cairns, *Pugh v. Heath*, L.R., 7 App. Cas., 237. Cotton, L.J., *Joseph v. Lyons*, L.R., 15 Q.B.D., 285). There has been vested "in one tribunal the administration of law and equity in every cause, action or dispute which should come before that tribunal." (*Per* Jessel, M.R., *Salt v. Cooper*, L.R., 16 C.D., 549).

As a complement to this section the fullest power of amendment is given and "all necessary amendments shall be made for the purpose of determining the real questions in controversy"; H.C.P. Act, secs. 23, 24. As to the power of the Court "to make and pronounce all such judgments as are necessary for doing complete justice," see sec. 31, *supra*.

33. (1) The High Court may make orders (a) or direct the issue of writs—

Mandamus.
Prohibition.
Ouster of office.
U.S. 689.

- (a) commanding (b) the performance by any court invested with federal jurisdiction, of any duty relating to the exercise of its federal jurisdiction; or
- (b) requiring (c) any court to abstain from the exercise of any federal jurisdiction which it does not possess; or
- (c) commanding (d) the performance of any duty by any person holding office under the Commonwealth; or
- (d) removing (e) from office any person wrongfully claiming to hold any office under the Commonwealth or
- (e) of mandamus (f); or
- (f) of *habeas corpus* (g).

(2) This section shall not be taken to limit by implication the power of the High Court to make any order or direct the issue of any writ.

(a) "Make orders."—In England and some of the colonies it is provided by statute law, and by rules of Court, that the objects sought to be accomplished by the issue of high prerogative writs shall in some cases be effected by the issue of orders or judgments. Thus by 19 & 20 Vict., c. 108, sec. 43, it is enacted that rules or orders requiring County Court Judges to perform duties relating to the duty of their offices may be issued without the necessity of resorting to the formality of a writ of mandamus. Under the Judicature Rules no writ of injunction

can be issued ; the purpose of an injunction is enforced by a judgment or order which has the effect that a writ of injunction previously had ; Or. 50, r. 11.

This section is placed under the general heading "Original Jurisdiction of the High Court," but only two of its subsections, viz., (c) commanding federal official to do his duty, and (d) removing federal official from office, relate solely to original jurisdiction. Sub-secs. (a), commanding a federal court, (b) requiring a court to abstain from acting, and (e) referring to mandamus generally, relate solely to appellate jurisdiction. Sub-sec. (f), *Habeas Corpus*, relates partly to original and partly to appellate jurisdiction. It is quite plain that orders or writs commanding federal Courts to exercise federal jurisdiction (mandamus), or requiring any Court to abstain from exercising a federal jurisdiction which it does not possess (prohibition), are made or issued in the exercise of the appellate power, and their separate enumeration must be regarded as merely declaratory of, and not supplementary to, the appellate power. Sub-sec. (c), commanding the performance of any duty by a federal officer, &c. (mandamus), is an example of the original judicial power granted by the Constitution, sec. 75 (v.) ; sub-sec. (d) removing from office &c. (*quo warranto*) is an example of the original judicial power contained in the grant "in all matters arising under the Constitution or involving its interpretation," and probably it may be a grant of part of the power to decide "matters arising under any law made by the Parliament." Sub-sec. (e) "of mandamus" is probably intended to imply that the preceding sub-sections (a) and (c) do not cover all the cases in which the writs may be issued ; sub-sec. (f), "of *habeas corpus*," confers power partly original, partly appellate in effect. The issue of a writ of *habeas* to determine the right to the custody of a child would involve the exercise of original jurisdiction. The issue of a similar writ to determine the legality of a warrant for imprisonment would involve the exercise of the appellate jurisdiction.

(b) "Commanding the performance by any Court."—It is the peculiar business of the Court of Queen's Bench to superintend all inferior tribunals and to enforce a due exercise of those judicial or ministerial functions with which the Crown or the legislature has invested them ; 3 *Bl. Com.*, 110. A writ of mandamus is the proper remedy against a judicial officer where he declines to exercise jurisdiction, that is, he refuses to hear and determine matters within his jurisdiction ; *Re Brighton Sewers Act*, 9 Q.B.D., 723.

MANDAMUS CONTRASTED WITH OTHER WRITS.—A prerogative writ of mandamus is a high prerogative writ issuing from the Crown side of the King's Bench Division of the High Court of England whereby the Court, in the name of the King, commands the person to whom it is addressed to perform some public or quasi-public legal duty which he has refused to perform, and the performance of which cannot be enforced by any other adequate legal remedy ; *Short and Mellor's C.P.*, p. 12.

A writ of mandamus is distinguishable from other analogous legal remedies as follows :—It differs from a mandatory injunction, or order for specific performance inasmuch as it lies only to enforce duties of a public or quasi-public character ; it cannot be invoked to enforce merely private rights whether arising under contracts or otherwise ; it is used only where an inferior tribunal, or person vested with certain power, has declined to exercise its jurisdiction or power. The object of a mandamus is not to review or control the action of another authority, but merely to compel it to act ; 3 *Black Com.*, 109 and 111 ; *Short and Mellor's C.P.*, p. 12.

Certiorari is used only where an inferior judicial authority has wrongly exercised, or exceeded its jurisdiction; its proceedings are brought up to be quashed. Prohibition is used wherever the inferior judicial authority has wrongly exercised or exceeded its jurisdiction and it is inhibited from further proceeding in the matter. *Quo Warranto* is used to question the validity of an election to an office. An injunction is a preventive writ; mandamus is remedial; injunction restrains motion and directs inaction; mandamus compels action and sets in motion. The writ of mandamus is discretionary; it is not a writ of right; Court may refuse to grant the writ not only on the merits of the case but on account of some delay or other matter personal to the applicant; *Short and Mellor's C.P.*, p. 14; *Ex parte Wallace*, 13 N.S.W.L.R., 1.

Sub-sec. (a) of the section under review deals only with writs or orders issued to Courts invested with federal jurisdiction; sub-sec. (e) refers to mandamus in general terms. The grant made by this section does not by implication limit the general or inherent power of the High Court. By sec. 38 (see *post*) the jurisdiction of the High Court is made exclusive with respect to matters in which the writ of mandamus is sought against an officer of the Commonwealth or a Federal Court.

AUSTRALIAN CASES.—The Court will grant a mandamus to a Judge of an inferior Court to state a case; *Ex parte O'Neil*, 1 W.N. (N.S.W.), 100; *R. v. Polman*, 3 A.J.R., 104. In New South Wales it will not be granted to compel him to state a case under the *Criminal Law Amendment Act*, except where a verdict has been returned; *Ex parte Burns*, 10 W.N. (N.S.W.), 70. A mandamus to hear and determine will only be granted when an inferior Court has not in fact heard or determined the question it is called on to determine according to law; *R. v. Alley, ex parte Brophy*, 7 A.L.T., 103. Where a Judge is vested with authority to hear a case, he is bound to do so; *R. v. Dunne, ex parte Baillie*, 3 V.R. (L.), 239. The writ must be granted where the Court is satisfied that there will otherwise be a failure of justice; *per Stawell, C.J.*, *R. v. Rogers*, 6 W.W. & A.R. (L.), 138. The writ was granted where there was a refusal by a Court to entertain a ground of defence; *King v. Hay*, 15 W.N. (N.S.W.), 306; a refusal to admit evidence; *Ex parte Himmelhoch*, 1 S.C.R. (N.S.), N.S.W., 247; *In re Lumb*, 14 S.A.L.R., 128; where Justices did not adjudicate; *Ex parte Nyberg*, 4 A.L.T., 78; and it was also granted against electoral justices to restore an elector's name to the roll; *R. v. Electoral Justices of Barcoo*, 9 Q.L.J., 111. The writ does not lie for improper rejection of evidence; *Ex parte The Minister for Lands*, 17 L.R. (N.S.W.), 394. "Mandamus is a writ of the Court to compel a public body to perform a public duty"; *R. v. Central Board of Health, ex parte Wilson*, 15 V.L.R., 375. As to the procedure, see Or. 41, rr. 13, *et seq.* As to mandamus by order, see Or. 41, r. 26. As to the principles of, and practice relating to, mandamus in the United States, see *Spelling's Extraordinary Relief*, 1893 ed., vol. II, p. 1107; *Foster's Federal Practice*, p. 814, §363, *et seq.*

(c) "Requiring any Court to abstain."—A writ of prohibition is a judicial writ issuing out of a superior Court and directed to an inferior Court for the purpose of preventing it from usurping a jurisdiction with which it is not legally vested. It is a preventive rather than a corrective remedy; it is used to stop the commission of some contemplated act and not to undo an act already performed; *Short and Mellor's C.P.*, p. 70. Where an inferior Court has juris-

diction and merely makes a mistake in the exercise of that jurisdiction, that of itself is no reason for the issue of a prohibition; an erroneous judgment is a matter of appeal, not prohibition. Prohibition must not be confounded with the remedy by injunction issuing out of Courts of Chancery, or common law against proceedings at law. Both writs have the same objects, but the difference between them is that an injunction is directed against one of the parties to the litigation whilst a prohibition is directed to the Court itself. An injunction usually recognizes the jurisdiction of the Court in which the proceedings are pending, but prohibition strikes at once against its original jurisdiction; *Short and Mellor's C.P.*, p. 70.

LIMIT OF SUB-SECTION.—This sub-section extends to Courts only and applies to both Federal Courts and State Courts. The proviso to the section, however, makes it clear that the inherent jurisdiction of the Court shall not by such an express grant be deemed to be limited. Under sec. 38 (e) in matters in which a writ of prohibition is sought against an officer of the Commonwealth or a Federal Court the jurisdiction of the High Court is exclusive. "It appears to me that the duty of keeping Federal Courts or Courts invested with federal jurisdiction within their respective jurisdictions must devolve on the Federal High Court alone, in which the judicial power of the Commonwealth in its plenitude is vested, and cannot be performed by a State Court invested with federal jurisdiction only to hear appeals." *Per Mr. Justice Owen in Ex parte Oesselmann* (1902), N.S.W. State Rep., 153. The term "Federal Court" in sec. 38 (e) means by virtue of the *Acts Interpretation Act* 1901, sec. 26 (b), "any Court created by Parliament."

AUSTRALIAN CASES.—Prohibition lies on the application of the Crown at any time to restrain the proceedings of an inferior Court which has exceeded its jurisdiction. It lies as of right to restrain an excess of jurisdiction in an inferior Court, although the defect does not appear on the record save where the applicant is debarred by his own conduct from claiming the writ; *R. v. The Justices of Brisbane, ex parte The Treasurer of Queensland*, 11 Q.L.J., 77; following *Broad v. Perkins*, 21 Q.B.D., 533; *R. v. Justices of South Brisbane, ex parte Zagami*, 11 Q.L.J., 81. If an inferior Court acts without jurisdiction a stranger may apply to the Court for a prohibition; *Ex parte Fraser*, 20 N.S.W.L.R. (L.), 67. Prohibition can only be granted where a tribunal has acted without jurisdiction or against the principles of natural justice; *Ex parte Webber*, 7 N.S.W.L.R., 317; and *R. v. Pohlman, ex parte Patterson*, 5 W.W. & A'B. (L.), 122; or in excess of jurisdiction; *Ellis v. Butler*, 21 S.A.L.R., 136; and it is open for a party to apply for a prohibition so long as the want of jurisdiction appears on the record; *Anderson v. Burrows*, 9 N.S.W.L.R., 150. It will lie before or after judgment or even after execution; *Turner v. Nicholson*, 1 S.C.R. (N.S.W.), 171, note (a); but not after satisfaction; *Ex parte Foster*, 11 S.C.R. (N.S.W.), 195.

See the following cases as to the grant of prohibition where the verdict was against natural justice; *Ex parte Shakespeare*, 15 N.S.W.L.R., 477; *Purcell v. Perpetual Trustee*, 15 N.S.W. L.R., 385; *Ex parte Moate*, 15 N.S.W.L.R., 83; *Ex parte Healey*, 9 W.N. (N.S.W.), 180; *Ex parte Martin*, 17 N.S.W.L.R., 200; *In re Scadden*, 16 N.S.W.L.R., 125; *Ex parte Lucas*, 16 W.N. (N.S.W.), 51. It lies where the information discloses no offence; *Ex parte Smith*, 12 W.N. (N.S.W.), 104; *R. v. Justices of Dalby, ex parte O'Keefe*, (1902) S.R. (Q.), 191;

and where a plaint in an inferior Court discloses no cause of action ; *In re M' Mullen*, 3 S.C.R. (Q.), 205. Prohibition was granted on a refusal to allow cross-examination of witnesses ; *Ex parte Kane*, 9 W.N. (N.S.W.), 25 ; see also *Smith v. Hennessey*, 19 W.N. (N.S.W.), 23. Where justices were disqualified by interest it was granted ; *Raven v. Cleveland Divisional Board*, 6 Q.L.J., 67. It was also granted where a necessary ingredient to constitute an offence was not proved, though the point was not raised in the Court below ; *Ex parte Bartlett*, 17 N.S.W.L.R., 108 ; see also *Ex parte Lucas*, 13 N.S.W.L.R., 228 ; *Ex parte Mumby*, 15 W.N. (N.S.W.), 209 ; *Ex parte Whelan*, 8 W.N. (N.S.W.), 50 ; *Ex parte McSwan*, 9 N.S.W.L.R., 417. An objection cannot be raised to the jurisdiction which does not appear on the face of the record or on the evidence ; *Ex parte Rowland*, 12 W.N. (N.S.W.), 79. So long as an inferior Court acts within the limits of its jurisdiction, no prohibition will lie, however erroneous the decision of the Court may be in fact or in law ; *Hale v. Molloy*, 4 W.N. (N.S.W.), 126 ; *Ex parte Scantritt*, 15 W.N. (N.S.W.), 244 ; *The King v. The Justices of Rockhampton*, (1903) 3 R. (Q.), 71 ; nor if the existence or non-existence of jurisdiction depends on contested facts which the inferior tribunal is competent to inquire into and determine ; *Holburd v. Burwood Coal Co.*, 11 N.S.W.L.R., 365. It will not be granted on the ground of improper rejection of evidence *R. on the Relation of City of Fitzroy v. Casey*, 23 V.L.R., 495 ; *M'Grath v. Rawlins*, 4 S.C.R. (Q.), 55. It will not be issued to an officer of the Court unless he has acted in a judicial capacity ; *R. v. Edwards, ex parte Howells*, 7 Q.L.J., 25 ; nor to a local Court in a matter collateral to the action, as in taxation of costs ; *Whiting v. White*, 2 S.A.L.R., 13.

Where there is nothing to prohibit it will be refused ; *Ex parte Medlyn*, 14 N.S.W.L.R., 276 ; *Ex parte Ardill*, 19 W.N. (N.S.W.), 107 ; also where the act sought to be prohibited is already done ; *Ex parte Braun*, 10 V.L.R. (L.), 359. Where, however, a fine has been paid ; *Ex parte McDermott*, 18 W.N. (N.S.W.), 231 ; or a term of imprisonment under a conviction has been served ; *Ogle v. Townley*, 2 S.C.R. (Q.), 202, application for prohibition may be made. The applicant is bound to apply for prohibition as soon as it appears that the lower Court has no jurisdiction ; *Boon v. Young*, 16 N.S.W.L.R., 139 ; see also *Ex parte Lenehan*, 9 W.N. (N.S.W.), 196 ; *Ex parte Victorian Railway Commissioner*, 24 V.L.R., 173. The practice of the Court when the respondent does not appear and the judge who granted the rule has no doubt about the matter is to make the rule absolute without hearing argument ; *Steele v. Lewis*, 1 Q.L.J., 137.

As to procedure, see Or. 41, rr. 27, *et seq.* ; as to principles of, and practice relating to, prohibition in the United States, see *Spelling's Extraordinary Relief*, 1893 ed., vol. II., p. 1395, *et seq.*

(d) "**Commanding the performance by any person holding office.**"—See sec. 38 (e) *infra*.

(e) "**Removing from office.**"—The section confers upon the High Court power to make orders or direct the issue of writs removing from office any person wrongfully claiming to hold any office under the Commonwealth. This express grant does not by implication limit any inherent power of the Court. The power granted is to issue orders in the nature of *quo warranto*. The ancient mode of procedure against persons who usurped or exercised offices, franchises, or liberties in derogation of the rights or prerogatives of the Crown, from which all public franchises emanated, was by the prerogative writ of *quo warranto*. The pre-

rogative writ is now obsolete, and in England there was introduced a more modern method of prosecution by information filed in the Court of King's Bench by the Attorney-General in the nature of a writ of *quo warranto*, wherein the process was speedier, and the judgment not quite so decisive. It is now well settled that proceedings by information in the nature of *quo warranto* will lie for usurping any office, whether created by charter of the Crown alone, or by the Crown with the consent of Parliament, provided that the office be of a public nature, and a substantive office, and not merely the function or employment of a deputy or servant at the will and pleasure of others; *Shortt, Information, Mandamus, Prohibition*, p. 121.

AUSTRALIAN CASES.—When an office is *de facto* full, the proper mode of procedure to settle the rights of rival claimants is by *quo warranto*; *R. v. Robinson, ex parte Torrance*, 1 V.L.R. (L.), 50. "The rule is that where a man has been in fact elected and has accepted office and is in office, whether he has been lawfully elected or not, the remedy for a person objecting to his holding office is *quo warranto* and not *mandamus*;" *per Higinbotham, C.J., In re Carroll, ex parte Dagnall*, 14 V.L.R., 622. The office of a town clerk is a public office; *In re Town Clerk, ex parte Alcock*, 2 W.A.L.R., 65. The authority of a person to exercise the office of a Judge in a County Court was questioned on proceedings by way of *quo warranto*; *R. v. Rogers, ex parte Lewis*, 4 V.L.R. (L.), 334.

The remedy of *quo warranto* is employed in the United States for the purpose of testing title to public office more frequently than for other purposes; in Great Britain most frequently in relation to municipal office. The public office in question must be a public office as distinguished on the one hand from a mere employment or agency, less than an office, with the right to exercise which, the Courts in *quo warranto* proceedings will not interfere, and on the other hand, from an office in which the public have an interest, it may be legislative, executive or judicial; *Amer. and Eng. Encyc. of Law* (1892 ed.), vol. 19, p. 668. As to cases in which it is granted against public officers in the United States, see *Spelling's Extraordinary Relief*, 1893 ed., vol. 2, p. 1450.

As to procedure, see Or. 41, rr. 5, *et seq.*

(f) "**Mandamus.**"—Sub-section (e) is apparently intended to make the declaration of jurisdiction more general than it is in sub-section (a) and (c).

(g) "**Habeas Corpus.**"—The writ of *habeas corpus* is the great prerogative remedy which the law has provided against violations of the right of personal liberty. Its object being to effect deliverance from illegal confinement, it commands the party detaining the prisoner to produce his body, with the true statement of the time of his caption and the cause of his detention. (*Foster's Fed. Prac.*, § 366; *Broom's Common Law*, 9th ed., p. 236). This section expressly confers upon the High Court power to make orders or direct the issue of writs of *habeas corpus ad subjiciendum*. Owing to its pre-eminent importance as a means of obtaining liberation from illegal confinement this writ is usually known as the writ of *habeas corpus*. There are other writs that come under the designation of *habeas corpus*, some of which are of antiquarian interest only. Those still in use are *habeas corpus ad testificandum*, *habeas corpus ad respondendum*, *habeas corpus ad deliberandum and recipias*; *habeas corpus* on return of *cepi corpus*. (See *Short and Mellor's Cr. Of. Prac.*, p. 335).

ORIGINAL AND APPELLATE.—The High Court has power to grant a writ of *habeas corpus* in the exercise of its original jurisdiction, such as in a contest between residents of different States as to the right to the custody of an infant. Its power is exclusive in respect of all matters jurisdiction with respect to which is vested exclusively in the High Court. It has also appellate judicial power to issue writs of *habeas corpus* on the application of persons in custody under judicial power, such as warrants for imprisonment, orders for commitment, in order to examine the validity of the authority under which the prisoner is detained; *per Story, J., Ex parte Watkins, U.S., 7 Pet., 568.* As the State Courts of the Commonwealth have been vested with federal jurisdiction, conflicts such as those that have arisen in the United States between the Federal and State Courts cannot be so great in the Commonwealth. It would appear that by the joint operation of the *Judiciary Act*, sec. 39, and the Constitution, sec. 76, the State Supreme Courts have been invested with jurisdiction with respect to issue of writs of *habeas corpus* in federal matters. As to exclusive jurisdiction, see *Jud. Act*, sec. 38.

AMERICAN CASES.—In the United States, except in cases affecting ambassadors, other public ministers, or consuls, or those in which a State is a party, the Supreme Court can only issue a writ of *habeas corpus* under its appellate jurisdiction; U.S. Const., Art. 3, sec. 6, sub-div. 2. Original jurisdiction to issue the writ of *habeas corpus* was conferred upon the district and circuit Courts of the United States in cases necessary for the exercise of their respective jurisdictions by the *Judiciary Act* 1789. The jurisdiction thus given in law to the circuit and district courts is original, that given by the Constitution and the law to the Supreme Court is appellate; *Ex parte Terger, 8 Wall, U.S., 858*; see also cases cited *Amer. and Eng. Encyc. of Law*, 1889 ed., vol. 9, p. 168. Sec. 753 of the Revised Statutes, U.S., enumerates the cases to which the writ of *habeas corpus* extends—viz., when a prisoner is in custody under or by colour of the authority of the United States, or is committed for trial before some Court thereof or for an act done or omitted in pursuance of a law of the United States, or an order process or decree of a court or judge thereof, or in violation of the Constitution or a law or treaty of the United States, or when being a subject or citizen of a foreign State and domiciled therein, he is in custody for an act done or omitted under any alleged right or exemption claimed under the commission or sanction of any foreign State, or under the colour thereof the validity and effect of which depend upon the law of nations, or where it is necessary to bring a prisoner into Court to testify.

In the United States the State Courts have a general jurisdiction to issue writs of *habeas corpus*, but the class of cases in which Federal Courts and State Courts have a concurrent jurisdiction to issue such writs is comparatively restricted. The general authority of Federal Courts and State Courts to issue writs of *habeas corpus* is based on the principle that the governments of the United States and of each State constitute two sovereign governments existing within the same territorial limits with distinct functions: that the tribunals of each sovereign have generally no authority within the sphere of the other, but that in case of a conflict between the authority of the two governments the tribunals of the United States are to adjudicate upon it; *Tarble's Case, 13 Wall., 397*; *Ableman v. Booth, 21 How., 506.* Thus the United States Courts can inquire by *habeas corpus* into the validity of any restraint upon personal liberty under authority of the United States; *Ex parte Houghton, 7 Fed. Rep., 657*, but not under the authority of any

State; U.S.R.S., sec. 753; *Ex parte Dorr*, 3 How., 103; *U.S. v. Rector*, 5 M'Lean, 174; unless the State, in authorizing the restraint, has violated some right derived from the United States. So the State Courts can inquire by *habeas corpus* into the validity of any restraint upon personal liberty, unless such restraint is under authority, or claim or colour of authority of the United States; *Robb v. Connolly*, 111 U.S., 624.

The United States Courts have no general jurisdiction, independent of statutory authority, to issue writs of *habeas corpus*; *Ex parte Barry*, 2 How., 65; *Barry v. Mercein*, 5 How., 105; but State Courts have such jurisdiction at Common Law. The Federal Courts and the State Courts therefore have a concurrent jurisdiction to issue such a writ in any case in which authority to issue such a writ has been specifically conferred on the Federal Courts, and has not been specifically prohibited to the State Courts; *Holt's Concurrent Jurisdiction*, p. 35; see also *Encyc. of Pl. and Prac.*, U.S., 1897 ed., vol. 9, p. 1006; *Amer. and Eng. Encyc.*, vol. 9, 1889 ed., p. 173.

"When the petitioner is in custody by the State authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof, or where being a subject or a citizen of a foreign State and domiciled therein, he is in custody under like authority, for an act done or omitted under an alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign State or under colour thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government or the obligations of this country to, or its relation with, foreign nations, the Courts of the United States have frequently interposed by writs of *habeas corpus*, and discharged prisoners who were held in custody under State authority. So also when they are in custody of a State officer, it may be necessary by use of the writ to bring them into a Court of the United States to testify as witnesses"; *Ex parte Royall*, 117 U.S.R., 241; *Minnesota v. Brundage* (1900), 180 U.S.R., 501. Except in cases of emergency, such as above defined, the applicant should be required to exhaust such remedies as the State gives to test the question of the legality, under the Constitution of the United States, of his detention in custody: *Minnesota v. Brundage* (*ib.*) See also *Davis v. Burke* (1900), 179 U.S.R., 399. "It is a settled rule that the writ of *habeas corpus* cannot perform the office of a writ of error." Fuller, C.J., *Terlinden v. Ames* (1901), 184 U.S.R., p. 278; *In re McKenzie* (1900), 180 U.S.R., 536.

HABEAS CORPUS IN THE COMMONWEALTH.—"The power of the Federal Courts of the United States to issue a writ of *habeas corpus* arises in the main not out of the Constitution, but by Statute . . . The original jurisdiction of the High Court of Australia is much more extensive than that of the Supreme Court of the United States, and, therefore, its inherent power to issue the writ goes further. But the greater number of cases in which the writ could be sought lie outside the original jurisdiction of the High Court, as defined by the Constitution, and can only arise by Statute. Until such statutory jurisdiction is given to a Federal Court, it would appear that the State Courts may issue the writ of *habeas corpus* in the cases referred to; but when jurisdiction is given, it will be exclusive in the Federal Court." *Moore, Commonwealth of Australia*, p. 272.

Many of the conflicts that have arisen in the United States cannot arise in Australia, as the State Supreme Courts here have been invested with federal jurisdiction. The *Judiciary Act*, sec. 30, has extended the original jurisdiction of the High Court, but by sec. 39 it has also given a wide federal jurisdiction to the State Supreme Courts. Section 33 (*f*) does nothing beyond declaring that the High Court has power to direct the issue of writs of *habeas corpus*. There is no express declaration that its power in this respect is exclusive; there is no enumeration of the cases in which either the High Court or the State Supreme Courts, in the exercise of their federal jurisdiction may direct the issue of writs of *habeas corpus*. It would appear that whatever cases lie out of the exclusive original jurisdiction of the High Court in these the writ of *habeas corpus* may still be sought in the State Supreme Courts; *Jud. Act*, sec. 39.

AS AN APPELLATE REMEDY.—Under the writ of *habeas corpus* the Court may examine into the legality of any commitment for criminal or supposed criminal matter. The writ also enables prisoners who have been legally committed in some cases to be admitted to bail. Any unlawful detention of an individual or deprivation of the liberty whether the alleged cause be civil or criminal, or if there be no ground at all alleged for the detention, may be inquired into by means of the issue of a writ of *habeas corpus*.

AUSTRALIAN CASES.—On a return to the writ the Court can inquire into the legality of a prisoner's detention under a warrant; *In re Levinger*, 6 W.W. & A'B. (L.), 8; *In re Pettet*, 11 N.S.W.L.R. (L.), 242; *In re Radcliffe*, 21 S.A.L.R., 99; *In re Court*, 2 S.C.R. (Q.), 171. *Habeas corpus* was held to go when the warrant of commitment did not show jurisdiction in the magistrate to imprison; *Re Mavrr*, Vic. Dig. Kerferd & Box, col. 316. When the warrant of commitment did not show the offence with which the prisoner was charged the prisoner was discharged; *Re Stockdale*, 1 S.C.R. (Q.), 110. The legality of a warrant of commitment by a colonial legislature may be raised by *habeas corpus*; *The Speaker of the Legislative Assembly v. Glass*, L.R. 3 P.C., 560. The Supreme Court of New South Wales was held to have jurisdiction to order the release of a prisoner confined in that country under an illegal sentence of a foreign Court; *Reg. v. Murray*, Legge's Reports, N.S.W., p. 287. When the warrant shows a sufficient order to justify the detention of the prisoner the Court will not look at the affidavits stating facts impugning the recitals in the warrant; *In re Devaney*, 3 W.W. & A'B. (L.), 103. The Court has power to go behind the warrant of conviction, although it be admitted to be good, and to inquire into the jurisdiction of the committing justices on affidavits of the prisoner that they had none; *In re Cornillac*, 1 W. & W. (L.), 193. Affidavits are admissible in a superior Court to show that the jurisdiction of an inferior Court has never attached to it, but are not admissible to show that when jurisdiction has attached the inferior Court acted on insufficient evidence in coming to a decision on the matter before it; *In re Keogh*, 15 V.L.R., 395; *In re Marshall*, 26 V.L.R., 816. The Court will not interfere by *habeas corpus* if the person charged be properly before a court of competent jurisdiction. Where, therefore, a prisoner was properly before a Court and was convicted by a jury of whom nine had not been sworn, it was held that the Court had no power to interfere by *habeas corpus*; *R. v. Cleary*, 5 W.W. & A'B. (L.), 85. Where the return to a writ stated a detention under a remand on a charge of larceny but did not show that the offence was charged to

have been committed within the territorial jurisdiction, the prisoner was discharged; *In re Caruchet*, 9 Q.L.J., 122. Compare also *R. v. King*, 1 S.C.R. (Q.), 1.

The proper mode of bringing the question of the legality of a sentence before the Court is apparently by writ of *habeas corpus*; *In re Forbes*, 8 N.S.W.L.R. (L.), 68; *In re Price*, 6 N.S.W.L.R. (L.), 140. The Court has no jurisdiction to bring up on *habeas corpus* a party confined in gaol to allow of his moving for a new trial in person; *Ashley v. Steele*, 2 W.N. (N.S.W.), 1.

The legality of imprisonment in extradition cases may be tested by the writ of *habeas corpus*; *R. v. Hustin*, 1 Q.L.J., 16; *In re Pedro*, 5 Q.L.J., 22; *R. v. Macdonald, ex parte Strutt*, 11 Q.L.J., 85; *R. v. Lewis, ex parte Chabal*, 1902 S.R. (Q.), 99; *R. v. Murray* 9 Q.L.J. N.C., 82; *Ex parte Morduit*, 2 W.A.L.R., 6; *In re Gerhard* (No. 1), 23 A.L.T., 127; (No. 2) 27 V.L.R., 484; (No. 3) 27 V.L.R., 655; *Ex parte Marks*, 15 N.S.W.L.R., 179; *Ex parte Rouanet*, 15 N.S.W.L.R., 269; *Ex parte Petitoff*, 16 N.S.W.L.R., 275; also the imprisonment of fugitive offenders; *In re Marshall*, 26 V.L.R., 816. A statute relating to extradition has been passed by the Commonwealth Parliament: the *Extradition Act* 1903.

An alien friend illegally detained under the authority of Commonwealth officers is entitled to apply for a writ of *habeas corpus*; *Ex parte Loo Pak*, 9 N.S.W.L.R., 221; *Ex parte Leong Kum*, 9 N.S.W.L.R., 250; *Ex parte Woo Tim*, 9 N.S.W.L.R., 493.

The Court can grant a writ of *habeas corpus* to bring a prisoner before a Committee of the Legislative Assembly for the purpose of giving evidence; *In re Kelly*, Legge's Reports, N.S.W., 1275. An applicant for a writ of *habeas corpus* who has been refused by one judge may make a fresh application to the Full Court. An applicant has the right to take the opinion of every judge, and every Court, as to the propriety of the detention complained of, and the judge or Court is bound to consider the question independently of any previous decision; *Ex parte Rowlands*, 16 N.S.W.L.R. (L.), 239. Cf. also *R. v. Malone*, (1903) S.R. (Q.), 140.

UNDER THE HIGH COURT RULES.—The rules provide that the Court or a Justice may, by order, without the issue of a writ of *habeas corpus* direct the production of any person in confinement for the purpose of his examination as a witness or for his trial; Or. 42, r. 1.

As to whether an appeal lies from an order refusing the writ—See *Jud. Act*, sec. 34. Cf. also *R. v. Malone*, (1903) S.R. (Q.), 140.

As to the procedure, see Or. 42.

As to practice in the United States, see *Desty's Federal Procedure*, vol. § 359; *Spelling's Extraordinary Relief*, 1893 ed., vol. 2, p. 929.

PART V.—APPELLATE JURISDICTION OF THE HIGH COURT.

Appeals.

34. The High Court shall, except as provided by this Act, have jurisdiction to hear and determine appeals from judgments whatsoever of any Justice (a) or Justices, exercising

Appeals from
Justices of
High Court.
See ss. 28, 78.

the original jurisdiction of the High Court whether in Court or Chambers.

(a) "**Appeals . . . from . . . any justice.**"—The Constitution, sec. 73, provides that, subject to exceptions and conditions to be prescribed by Parliament, the High Court shall have jurisdiction *inter alia* to hear and to determine appeals from all judgments, decrees, orders and sentences of any Justice exercising the original jurisdiction of the High Court. The 34th sec. of the *Judiciary Act* merely declares what the Constitution has already granted, and it prescribes, or rather refers to, an exception to the appellate jurisdiction prescribed by sec. 27, viz., that there shall be no appeal to the High Court from a decision of a Justice of the High Court with respect to costs which are by law in the discretion of the Court, except by leave of the Justice or Court.

As to costs, see Rules of Court, Or. 46; as to jurisdiction in Chambers, see *Jud. Act*, sec. 16; as to quorum on appeals from a Justice of the High Court exercising original jurisdiction, see *Jud. Act*, sec. 20; as to the original jurisdiction of the High Court, see *Jud. Act*, sec. 30; as to granting new trials, see *Jud. Act*, sec. 36; H.C.P. Act, sec. 14; as to the powers of the High Court in the exercise of its appellate jurisdiction, see *Jud. Act*, sec. 37; as to power of amendment, see H.C.P. Act, secs. 23, 24; as to security in an appeal case, see H.C.P. Act, sec. 35 *et seq.*; as to stay of proceedings under a judgment appealed from, see H.C.P. Act, sec. 38; as to death of a party to an appeal, see H.C.P. Act., sec. 39; as to procedure on an appeal from a Justice of the High Court, see Rules of Court, Part II., sec. 1; as to appeal being heard at the seat of Government of the State in a Registry whereof the cause is pending, unless otherwise directed, see Rules of Court, Oct. 12th, 1903, r. 2 (1), (1a).

35. (1) The appellate jurisdiction of the High Court with respect to judgments of the Supreme Court (a) of a State, or of any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall extend to the following judgments whether given or pronounced in the exercise of federal (b) jurisdiction or otherwise and to no others, namely :

Appeals from
Supreme Courts
of States.

(a) Every judgment, whether final or interlocutory (c), which—

- (1) is given or pronounced for or in respect of any sum or matter (d) at issue amounting to or of the value of Three hundred pounds; or
- (2) involves directly or indirectly any claim, demand, or question, to or respecting any property or any civil right (e) amounting to or of the value of Three hundred pounds; or

- (3) affects the status (*f*) of any person under the laws relating to aliens (*g*), marriage, divorce, bankruptcy, or insolvency;

but so that an appeal may not be brought from an interlocutory judgment except by leave of the Supreme Court or the High Court—

- (*b*) Any judgment, whether final or interlocutory, and whether in a civil or criminal (*h*) matter, with respect to which the High Court thinks fit to give special leave (*i*) to appeal:

- (*c*) Any judgment of the Supreme Court of a State given or pronounced in the exercise of federal jurisdiction in a matter pending in the High Court:

including respectively every or any such judgment which has been given or made before (*j*) the commencement of this Act, and as to which—

- (1) leave to appeal to the King in Council might at the commencement of this Act be granted by the Court appealed from; or

- (2) leave to appeal to the King in Council has before the commencement of this Act been granted by the Court appealed from, and up to the commencement of this Act the conditions of appeal have been complied with within the periods limited; or

- (3) a petition for special leave to appeal to the King in Council has been lodged and is pending at the commencement of this Act.

(2) It shall not be necessary in any case, in order to appeal from a judgment of the Court of a State to the High Court, to obtain the leave of the Court appealed from.

(a) **Supreme Court of a State.**—The Constitution, sec. 73, gives to the High Court subject to exceptions and conditions to be prescribed by Parliament, jurisdiction to hear and decide appeals from the Supreme Court of any State or from any Court of final appeal in a State such as that of South Australia or from any Court exercising federal jurisdiction. The *Judiciary Act*, sec. 35, in effect prescribes the conditions of and exceptions to the right of appeal from judg-

ments of the Supreme Courts of States whether given in the exercise of federal jurisdiction or otherwise. In the case of *Hannah v. Dalgarno* (1903), 1 C.L.R., 1; 9 A.L.R. (C.N.), 85, Griffith, C.J., in delivering the judgment of the Court, said that the Parliament had no authority to create any additional appellate jurisdiction. The authority, therefore, if any, of the Court to hear the case then before it was to be sought not in the *Judiciary Act*, but in the Constitution itself, and sec. 35 of the *Judiciary Act* was to be regarded not as a provision for creating rights of appeal, but as a provision making exceptions from the jurisdiction conferred by the Constitution and prescribing regulations as to its exercise.

Sec. 35 of the *Judiciary Act* has been passed by Parliament as its interpretation of the method of exercising the excepting and regulating power. For the most part it appears to confer jurisdiction affirmatively; it defines rather than excepts. In some respects it regulates. By defining the cases in which appeals may be brought, the implication is raised that appeals cannot be brought in any other cases. The section should, therefore, be construed not as giving jurisdiction, but as making exceptions by implying a negation of jurisdiction in every case where jurisdiction does not purport to be affirmatively given; *Quick and Garrau's Annot. Const.*, p. 738.

Although it stands under the heading "Appellate Jurisdiction," sec. 35 does not purport to be an enumeration of all the Courts from which appeals can be brought to the High Court. If it did purport to be such, it would not be complete. It refers only to appeals from State Supreme Courts and other State Courts from which, at the establishment of the Constitution, appeals could be brought direct to the Queen in Council; it is silent as to appeals from inferior State Courts invested with Federal jurisdiction. The right of litigants to appeal from such Courts direct to the High Court is defined by sec. 39 (b) and (c).

As to quorum on appeals from State Supreme Courts, see *Jud. Act*, sec. 21 (2); as to power to grant new trial, see *Jud. Act*, sec. 36; as to the powers of the High Court in the exercise of its appellate jurisdiction, see *Jud. Act*, sec. 37; as to power of amendment, see H.C.P. Act, sec. 23; as to security in the case of an appeal from a judgment of the Supreme Court of a State, see H.C.P. Act, sec. 35; as to stay of proceedings under the judgment appealed from, see H.C.P. Act, sec. 38; as to the death of a party to an appeal, see H.C.P. Act, sec. 39; as to procedure on appeals from Supreme Courts of States, see Rules of Court, Part II., sec. iv., and Rules of Court, Oct., 12th, 1903, r. 2 (6), (7), (8); as to appeals being heard at the seat of Government of the State from a Court whereof the appeal is brought, see Rules of Court, Oct. 12th, 1903, r. 2 (6).

(b) "Federal jurisdiction or otherwise."—The Supreme Courts of the States are invested with federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred on it; *Jud. Act*, sec. 39.

It should be noted that sec. 35 does not confer Federal jurisdiction on any State Court; it merely affirms that there may be an appeal against judgments given or pronounced in the exercise of Federal jurisdiction or otherwise. We have to look elsewhere for provisions investing the Supreme Courts and other Courts of the States with Federal jurisdiction; that provision is to be found in sec. 39, where it is hedged about with conditions of a most precise character. The main

object of those conditions is to confer Federal jurisdiction on State Courts, *sub modo*, reserving to the High Court exclusive appellate jurisdiction in such cases.

The Constitution does not expressly define the exact meaning of federal jurisdiction, but it is conceived that the expression is quite capable of meaning both original jurisdiction to entertain a federal case in the first instance and give judgment thereon, and that it is also capable of including the case of an Appellate Court, authorized to revise and review the decision given by a Court of First Instance, in the exercise of original jurisdiction. Under the *Federal Customs Act* 1901, sec. 245, State Courts of Summary Jurisdiction can deal with customs prosecutions; by sec. 248 a person aggrieved may appeal against the decision, in such a case, to the Supreme Court of a State. In *Ex parte Oesselman* (1902), N.S.W.S.R., p. 153, the Full Court (N.S.W.), *per* Owen, J., said:—"From this it is clear that a Court of Summary Jurisdiction, thus dealing with a customs prosecution instituted in it, is, by an Act of the Federal Parliament, invested with federal jurisdiction, and it appears also clear that by sec. 248 the Court to which an appeal shall lie from the Court of Summary Jurisdiction is for the purpose of such an appeal invested with federal jurisdiction."

"A distinction between the several capacities in which a Supreme Court may act is, no doubt, unfamiliar. But such a distinction between the several capacities in which a single Judge or an inferior Court may exercise jurisdiction, so that an appeal from a decision in one capacity may lie to one Court, and from a decision in another capacity to another Court, is not unusual. A familiar instance is that of the Chief Justice of New South Wales acting as such and as a Judge of the Vice-Admiralty Court. This distinction is most explicitly taken in sec. 39 of the *Judiciary Act*." *Per* Griffith, C.J., in *Hannah v. Dalgarno*, 1 C.L.R., at p. 10; 9 A.L.R. (C.N.), 86.

As to quorum on appeal from a Judge of a Supreme Court exercising federal jurisdiction, see *Judiciary Act*, sec. 20. As to procedure on appeals from Judges of the Supreme Courts in the exercise of federal jurisdiction, see Rules of Court, Part II., sec. (ii); Rules of Court, Oct. 12th, 1903, r. 2 (5). As to other cross references see note (a) *supra*.

(c) "**Final or Interlocutory.**"—No unqualified right of appeal is given from an interlocutory judgment pronounced by a State Supreme Court whether acting solely in its capacity as a State Court or in the exercise of federal jurisdiction even if the money issue, property, or civil right involved exceeds in value £300. The Supreme Court is, however, authorized to grant leave to appeal against such a judgment to the High Court, or the High Court itself may grant leave to appeal. By the *Judiciary Act*, sec. 2, "judgment" includes decree, order, or sentence.

FINAL.—"No order, judgment, or other proceeding can be final which does not at once affect the status of the parties, for whichever side the decision may be given; so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff" (*per* Brett, L.J., *Standard Discount Co. v. La Grange*, 3 C.P.D., 71). "Where a further step is necessary to perfect an order or judgment, it is not final, but interlocutory" (*per* Baggallay, L.J., *Collins v. Paddington*, 5 Q.B.D., 370). Every order need not necessarily be a final judgment because it puts an end to the matter in which it deals. Thus an order dismissing an action for non-prosecution

is not a final judgment; *Re Riddell*, 20 Q.B.D., 512; nor is a garnishee order absolute a final judgment; *Ex parte Chinery*, 12 Q.B.D., 342; nor is an order for costs on an action which has been stayed; *Ex parte Schmitz*, 12 Q.B.D., 509; nor is an order for alimony *pendente lite*; *Re Henderson*, 20 Q.B.D., 509. As to what is a final judgment, see also *Scott v. Meehan*, 1 W.A.L.R., 179; *In re The Anglo-Australian I.F. and L. Co.*, 14 N.S.W.L.R. (E.), 110; *Queensland Investment and Land Mortgage Co. Ltd. v. Grimley*, 4 Q.L.J., Supp., 15.

INTERLOCUTORY.—Interlocutory orders or judgments are those made during the progress of a cause, determining certain rights incidental thereto, but not the final right, or full amount.

It has been held that an order granting a new trial cannot be the subject of appeal to the Privy Council under the aforesaid Orders in Council—it is not a final order; *Crook v. Ormerod*, 3 W.W. & A'B. (L.), 132; *Rocke, Tompaitt and Co. v. Wilson*, 13 V.L.R., 833; 9 A.L.T., 36; see also *Parker v. Falkner*, 10 N.S.W.L.R., 14; *Christie v. Robertson*, 6 W.N. (N.S.W.), 98. On the other hand, an order for a new trial might not be considered an interlocutory order, and consequently there would be no right of appeal to the High Court against such an order on that ground. It is possible, however, in such circumstances the High Court could, under sec. 35 (b), give special leave to appeal.

"When you have, not an application in an action, but an original proceeding, e.g., by originating summons, the test whether an order is final order or not, is to be arrived at by considering, as a matter of substance, what was the matter in dispute, and does the order made determine it one way or another;" *Re Reeves* (1902), 1 Ch., p. 32 (C.A.); *Salaman v. Warner* (1891), 1 Q.B., 734 (C.A.). See note "Final," "Interlocutory," *Ann. Prac.* (1903), pp. 820-837. The following orders have been held "interlocutory":—An order made on a motion under Or. 25, rr. 2, 3; *Salaman v. Warner*, *supra*; or r. 4; *Bright v. River Plate &c.*, 17 T.R., 708; cf. *Price v. Phillips*, 11 T.R., 86; an order on a creditor's claim in an action for administration; *Re Abdy*, W.N. (95), 12; an order for a commission to examine; *Edison-Bell & Co. v. Hough*, 98 L.T. Jo., 374; an order for a special case to be stated, under *Municipal Corp. Act*, sec. 93; *Monksvell v. Thompson* (1898), 1 Q.B., 353; an order to enter in commercial list; *Sea Insurance Co. v. Carr* (1901), 1 Q.B., 7 (C.A.); an order to refer to arbitration; *Neale v. Gordon-Lennox* (1902), 1 K.B., 838; (1902), A.C., 465; a decision of the Full Court on the question of postponing a trial; *Crotty v. Clarke*, 3 A.L.R. (C.N.), 2. In a case of *Carnley v. Fordham* an appeal from a garnishee order absolute was treated as interlocutory; *Re Hodgkinson*, 98 L.T. Jo., 423; In *Forbes Smith v. F.S.* (1901), P., 258, leave to appeal was refused by both Courts, but the appeal was set down and heard, and as the order was decided to be a final order leave was not required. See *Ann. Prac.* (1903), II., p. 504. An order of the Court on an application to review the taxation of a bill of costs referring the matter back to the Prothonotary is not final; *In re Macnamara's costs*, 1 W.N. (N.S.W.), 33. The Judicial Committee of the Privy Council does not encourage appeals from interlocutory orders of a temporary character such as an interim injunction; *Croudace v. Zobel* (1899), A.C. 258.

"There is, in my opinion, a fundamental difference between interlocutory and final orders as well as between interlocutory and final judgments. Interlocutory orders and judgments are only intended to affect the rights of the parties in the

litigation. They are always subject to review when fresh facts are brought to the consideration of the Court. Judgments passed and entered stand in a very different position. In the case of an interlocutory order it is generally possible to restore parties to their original position by payment of costs or otherwise; final orders are intended to, and do, as a rule, determine the rights of the parties. Perhaps I should add, in deference to the argument, that I am clearly of opinion that an order to refer an action is an interlocutory and not a final order"—*per* Alverstone, C.J., in *Neale v. Gordon-Lennox* (1902), 1 K.B., 838.

(d) "**Any sum or matter.**"—A litigant in a suit in the Supreme Court of a State, dissatisfied with any judgment, decree, or order, final or interlocutory, given or pronounced in the exercise of federal jurisdiction or otherwise, for or in respect of any sum or matter at issue amounting to, or of the value of £300, has the right of appeal to the High Court. The form of words used in sec. 35 (a) (1) corresponds with the form of words to be found in the Orders in Council giving the right of appeal, in certain cases, to the Privy Council from the Supreme Courts of the Australian Colonies. There are, however, two points of difference, the one being that there can be an appeal to the Privy Council only from final judgments, decrees, or orders, and the other that the sum or matter at issue must be of the value of £500 and upwards.

Under the Orders in Council of June, 1860, it has been held that the value of the matter in issue is a fact to be controverted and tried, and upon which both sides are to be heard; *Kettle v. The Queen*, 3 W.W. & A'B. (Eq.), 141.

It has been held that interest upon the damages awarded in an action is not to be considered as part of the sum in issue for the purpose of obtaining leave to appeal to the Privy Council; *McSwain v. McMillan*, 2 V.L.R. (L.), 271. See, however, *Bosswell v. Kilborn*, 12 Moo. P.C., 467; and *Graham v. Proudfoot*, 15 N.S.W.L.R., 452.

Arbitrators had made an award of £8,000 as the purchase money of a business, and the award was referred back to the arbitrators by order of the Court, and the amount awarded by the new award was less by £220 than the sum awarded by the former one. On an application for leave to appeal to the Privy Council against the order referring back the award it was held that the matter in issue was not the value of the business, but the difference between the two valuations of the arbitrators, and this being under the appealable amount, leave was refused; *In re Armstrong and Culley*, 4 V.L.R. (L.), 178. In *Macfarlane v. Leclair*, 15 Moo. P.C., 181, it was decided that, in determining the question of the value of the subject matter in dispute, upon which the right of appeal depended, the proper course was to look at the judgment as to the extent that it affected the interest of the party prejudiced by it, and seeking to relieve himself from it by appeal, and that, considering the amount seized, the matter in dispute upon which the appeal was founded exceeded in value £500.

Several actions arising out of the same cause were brought by different parties through the same attorney against the same defendants. In one of these, which had been carried on at the expense of a fund, to which the various plaintiffs had contributed, a judgment was obtained which would govern the rest. It was held that the judgment in the decided case did not indirectly involve a question respecting the amounts claimed in the others; *Morse v. A.S.N. Co.*, 9 S.C.R.

(N.S.W.), 81. A municipality brought an action against a defendant to recover the sum of £18, alleged to be due for rates. The defendant set up the defence that the plaintiffs were not duly incorporated, and the Full Court decided in his favour. It appeared that there was due at the time of this decision about £600 for rates. It was held that, in considering the amount involved, the Court had to look at the judgment as it affects the interests of the parties who are prejudiced by it, and that in this case the plaintiffs were entitled to appeal, as the decision of the Court from which the plaintiffs wished to appeal involved a question respecting a civil right of more value than £500 to them; *Municipality of Gundagai v. Norton*, 15 N.S.W.L.R., 459.

In order to bring the case within the appealable amount £500 must be directly or indirectly involved between the same parties as those in respect of whom the order appealed from was made; *In re Bonang G.M. Co.*, 4 B.C. (N.S.W.), 47; it is not enough that that sum may be involved between one of the parties to the suit and third parties; *Wavertree Sailing Ship Co. v. Love*, 12 W.N. (N.S.W.), 62. Where the amount involved was the amount of the verdict, together with interest to which the plaintiff was entitled at the time of signing judgment, and these together reached £500, leave was granted. *Graham v. Proudfoot*, 15 N.S.W.L.R., 452; *Owston v. Bank of N.S.W.*, L.R. 4 App. Cas., 270. Where the amount of a verdict was over £500, but this after the judgment of the Full Court had been delivered the plaintiff had consented to reduce to £450, the Court held it had jurisdiction to entertain an application for leave to appeal, as the amount in respect of which judgment was delivered was above £500; *Mackenzie v. Williams*, 11 S.C.R. (N.S.W.), 193. A verdict had been given with one farthing damages and a new trial was granted on the ground that the damages ought to have been more than nominal. The Court held that although the plaintiff in his declaration claimed £10,000, yet, as the verdict set aside was only one farthing there was not a sufficient amount in question to give the defendant the right to appeal; *Jones v. The Municipal Council of Sydney*, 1 N.S.W.L.R. (L.), 315. On an application for leave to appeal on a demurrer the plaintiff was allowed to reduce the damages claimed in the declaration below the appealable amount; *Dowling v. Jones*, 2 N.S.W.L.R. (L.), 54. But leave to reduce an amount was refused in *Delamont v. A. K. S. & O. C.*, 1 W.N. (N.S.W.), 29. In an action to recover £79 being the duty levied on a shipment of pulp fruit, leave to appeal was granted on it appearing that other actions were pending in which the amount claimed was £293, and that a bond had been entered into by the plaintiff for £835 to secure the duty on subsequent importations of the same article; *Peacock v. Powell*, 2 W.N. (N.S.W.), 108. Where £3,000 was claimed in the declaration and the defendant obtained a verdict which the Full Court set aside and ordered a new trial, held that the amount of £500 was involved even though the jury at the trial might award less; *Christie v. Robertson*, 6 W.N. (N.S.W.), 98.

A plaintiff brought on a special case stated for the opinion of the Court, obtained judgment for £289 13s. 9d., being municipal rates due from the defendant for 1897. The defendant moved in Chambers for leave to appeal to the Privy Council from this judgment, showing that the plaintiff also claimed a further sum of £289 13s. 9d., being rates due for 1898. The Court held that leave to appeal should not be granted; *Borough of Randwick v. Dangar*, 15 W.N. (N.S.W.), 104. A person whose income tax was assessed at £250 for 1896 appealed from the

assessment, and the Supreme Court upheld the appeal. When the Commissioners moved for leave to appeal the tax for 1897-8 would, but for the judgment of the Court have been due, making £750, it was held that the appealable amount was not involved; *In re Tindal*, 14 W.N. (N.S.W.), 134.

Where a penalty of £500 was recovered in an action for breaches of sec. 28, 29 of the *Constitution Act* of New South Wales (18 & 19 Vict. c. 54), leave to appeal was granted; *Proudfoot v. Proctor*, 8 N.S.W.L.R., 468.

(e) "**Property or civil right.**"—The appellate jurisdiction of the High Court also includes every judgment, decree, or order of the Supreme Court of a State, whether final or interlocutory, which involves directly or indirectly any claim, demand, or question to or respecting any property or any civil right amounting to or of the value of £300. Substituting £300 for £500 and omitting interlocutory matters, the provisions of sec. 33 (a) (2) are based on similar words in Orders in Council giving the right of appeal to the Privy Council. In estimating the appealable value, regard will be had to the whole matter involved in the suit, and not to the value of a fractional part of the property sought to be recovered by the petitioner; *Ponamina v. Arumogam* (1902), A.C., 561.

A company was fined £10 by a Justice's order, and the Supreme Court affirmed the order. An application for leave to appeal to the Privy Council was granted on the uncontradicted affidavit of the company's secretary that the case "indirectly" involved a claim or demand relating to property of the value of £500; *Bendigo Waterworks Co. v. Thunder*, 1 V.R. (L.), 123; 1 A.J.R., 103. But in a suit for specific performance of an agreement to sell a right-of-way in which a decree was made, it was held that the incidental effect of the decree upon other property of the defendant not directly affected by the decree could not be taken into account in making up the appealable amount; leave to appeal refused; *Wakefield v. Parker*, 6 W.W. & A'B. (E.), 322. A municipal corporation was sued by a property holder for altering the levels of a road, and a verdict for £264 was obtained, and this verdict was upheld by the Full Court. Subsequent to such verdict, an action was commenced by another property holder in respect of the same alterations against the defendants. The defendants applied for leave to appeal to the Privy Council in the first action, and it was stated in an affidavit filed on their behalf that it was believed that other property holders intended to bring actions in respect of the same subject matter. It was held, *per* A'Beckett, J., that the judgment in the first action involved directly or indirectly, a claim in respect of property of the value of £500, and leave to appeal was granted; *Bailey v. The Mayor &c. of Port Melbourne*, 14 V.L.R., 260; 10 A.L.T., 44. See also *Annois v. The Mayor of East Fremantle*, 2 W.A.L.R., 62. In *Wilcox v. Clarke*, 21 V.L.R., p. 752 (1896), *per* A'Beckett, J., it was held that a judgment of the Supreme Court, in which a sum of less than £500 is directly involved, cannot be said to involve a sum indirectly exceeding that amount, merely by reason of the fact that the decision will probably govern a number of other similar claims amounting in the aggregate to more than £500; *Bailey v. Mayor &c. of Port Melbourne*, 14 V.L.R., 260; 10 A.L.T., 44; and *Bendigo Waterworks Co. v. Thunder*, 1 V.R. (L.), 123, distinguished; *Wilcox v. Clarke*, 21 V.L.R., 752; 17 A.L.T., 266; 2 A.L.R., 60.

In bankruptcy and insolvency cases the value of the debtor's estate, and not the amount of the petitioning creditor's debt, is the standard by which the

amount of the matter in issue is to be measured on an appeal to the Privy Council from an order granting or refusing compulsory sequestration; *In re McDonald*, 2 V.R. (I.E. & M.), 12; 2 A.J.R., 131. But where the property could be recovered by the assignee only by litigation, which the Court thought must be unsuccessful, leave to appeal refused; *ibid.*

Where the affidavit sets out facts from which it can be plainly inferred that the appellants have a civil right of the value of £500, which is affected by the decision, though that fact is not specifically set forth, the affidavit is a sufficient compliance with the requirements of the Order in Council in that respect; *The Queen v. The Shire of East Loddon, ex relatione Cheyne*, 21 A.L.T., 53, 71; 5 A.L.R., 189, 223. F.C., Madden, C.J., Williams and Holroyd, JJ., affirming judgment of A'Beckett, J. (1899). Where in an action to recover possession of land of greater value than £500 the defendant sets up by way of defence that he is entitled to a tenancy of the land until a debt due to him exceeding £500 in amount is repaid, then, although the rent payable in respect of a tenancy is less than £50, the real dispute between the parties is with regard to an amount exceeding £500; *Commercial Bank of Australia v. McCaskill*, 23 V.L.R., 343; 19 A.L.T., 102; 3 A.L.R., 217. F.C., A'Beckett, Hodges and Hood, JJ. (1897).

A *cestui que trust* brought an action against his trustee seeking re-instatement of a trust fund of over £500 in value alleged to have been lost through breaches of trust, but in which he was individually interested to an extent less than £500, held to have no right of appeal; *Skinner v. Trustees &c. Co. Ltd.*, 27 V.L.R., 377.

In actions in respect of civil rights the test of whether the appealable amount has been reached is not the amount endorsed upon the writ; *Tipping v. The Mayor of Perth*, 2 W.A.L.R., 110. Where property in dispute has a "*pretium affectionis*" of more than £500, but is actually of less value, leave to appeal will be refused; *Naylor v. Slattery*, 2 W.N. (N.S.W.), 55.

When an injunction had been granted upon an information by the Attorney-General, on behalf of the Crown, restraining a society from charging admission from the public to certain lands, and a declaration had been made declaring void a lease under which the society had entered upon the lands, and expended on buildings and improvements the sum of £30,000, it was held that the decree involved "directly or indirectly a question respecting property amounting to the value of £500"; *Attorney-General v. Municipal Council of Sydney*, 13 N.S.W.L.R. (E.), 151.

The Commissioner for Railways resumed a portion of land, and paid the purchase money into Court. It amounted to £693, of which the appellant claimed two-fifths under a will. £500 was indirectly involved, as the share in the money in Court, together with the share in the balance in the land claimed by the appellant, amounted to more than that sum; *Williams's Case*, 20 N.S.W.L.R. (E.), 28.

Where a verdict had been entered by consent for plaintiff for 40/- the Court granted leave to appeal on an uncontradicted affidavit by the defendants that the right involved in the action was £500; *Want v. Moss*, 5 W.N. (N.S.W.), 153. Where the sum in issue was less than £500 leave to appeal was allowed, as the judgment "indirectly" involved a claim respecting property amounting to that sum; *Tyson v. McEroy*, 3 S.C.R. (L.), 365. Leave to appeal was also refused in

a suit for redemption of a mortgage over an estate worth £11,000 where the only real question between the parties was the payment of a sum of £80 interest in advance in repayment of the principal; *Cope v. Trustees of the Savings Bank of N.S.W.*, 10 W.N. (N.S.W.), 68. Where the appellant had purchased land for £210 and swore that the land and improvements were of the value of £500 it was held that the matter in issue was over £500; *Mate v. Nugent*, 7 S.C.R. (N.S.W.), 342.

On an application by an unsuccessful plaintiff in an action to recover possession of gold mining leases, it appeared that the value of the leases was £8,200 and that they were mortgaged to the defendant for £8,000: held that the judgment appealed from involved a question to or respecting property or a civil right amounting to or of the value of £500; *Rogers v. Royal Bank of Queensland*, 9 Q.L.J. N.C., 140.

In a case in which the amount of costs in dispute was £254 11s. 8d., and the costs of taxation if added to that sum would have exceeded the amount of £500, it was held that such sum could not be added so as to make up the appealable amount; *In re Marsland & Marsland* (1903) S.R. (Q.), 56.

(f) "**Status.**"—Status is a condition or relationship to which a bundle of rights and duties is annexed. Status is contrasted with contract. The rights and duties arising from status are fixed by law independently of the consent of the parties. The rights and duties founded on contract are those fixed by the agreement of the parties; *Hearn's Legal Rights and Duties*, pp. 48, 56, 369. The movement of progressive societies is one from status to contract; *Maine's Ancient Law*, p. 190. It would seem that the State Supreme Court had no power to grant leave to appeal to the Privy Council where the status of persons was affected; *per* Faucett, J., 8 S.C.R. (N.S.W.) E., at p. 127.

(g) "**Aliens.**"—An alien, according to British law, is a subject of a foreign state who has not been born within the allegiance of the Crown, or naturalized according to law; *Reg. v. Burke*, 11 Cox, C.C., 138. The character of an alien and a British subject cannot be united in one person. The status of a person in the Commonwealth, as whether he is alien or not, is to be determined by the law of the Commonwealth relating to aliens and naturalization (see *Naturalization Act* 1903); but the rights and liabilities incident to that status are fixed partly by Commonwealth law and partly by the law of the State where he has been or is a resident. Accordingly in one case it was determined—1st, that a Frenchman who had resided in the Mauritius, and had filled the office of assignee of insolvent estates, and been admitted to take the oath of allegiance, was clearly an alien; 2nd, that according to the French law, which, by the treaty of cession in 1810, prevails in the Mauritius, the circumstances of the case did not constitute that "authorization by the government," in the absence of which, according to the French law, an alien may be removed without cause shown; *In re Adams*, 1 Moo. P.C., 460. There is no foundation for the notion that by the common law of England the posterity of a natural-born British subject, though born abroad, must be treated as British subjects for ever. The rule that the children born abroad of ambassadors in the service of the Crown of England abroad are treated as natural-born British subjects does not apply to the children born abroad of officers in the military service of the Crown in foreign parts; *De Geer v. Stone*, 52 L.J., Ch. 57; 22

Ch. D., 243. At the British Parliamentary elections in 1885 the following persons voted:—(1) Persons born in the kingdom of Hanover before 1837 and not naturalized; (2) persons born in that kingdom since 1837 of parents born there before that date and not naturalized; (3) a person born in Prussia since 1837 of parents born in Hanover in 1802 and not naturalized: Held that such persons were aliens in the contemplation of the law relating to Parliamentary elections, and, as such, disentitled to vote, though upon the register; *Isaacson v. Durant*, 55 L.J., Q.B., 331; 17 Q.B.D., 54. As to aliens, see also *Quick and Garran's Annot. Const.*, p. 599.

Questions relating to the status of aliens may arise under the *Naturalization Act* passed by the Federal Parliament, under other Federal Acts imposing disabilities on aliens, or under State laws, so far as they are not modified by Federal laws. In whatever jurisdiction, State or Federal, such cases arise, an appeal will lie to the High Court, irrespective of any money or property question.

(h) "**Civil or criminal matter.**"—In a civil case involving a money issue, property, or civil right less in value than £300 decided by the Supreme Court of a State in the exercise either of State or Federal jurisdiction, a defeated litigant has no right to appeal to the High Court. In a criminal case decided by a State Supreme Court there is no right of appeal to the High Court unless the case be one of an offence against the laws of the Commonwealth; *Jud. Act*, sec. 72. In such cases and matters, however, the High Court can, if it thinks fit, grant "special leave to appeal." This is in pursuance of the practice and procedure of the Privy Council, in reference to the allowance of appeals as a matter of grace, compared with a legal right to appeal in cases coming within the conditions of the Orders in Council. Where a party desires to appeal from a Colonial Court to the Privy Council but cannot do so as of right, he presents a petition to the King in Council praying for "special leave" to appeal. The petition is referred to the Privy Council to advise the Crown as to the propriety of granting or withholding permission; *Macpherson's Practice of the Judicial Committee*. It will be noticed that the "special leave" to appeal mentioned in sub-sec. (b) is contrasted with "leave of the High Court" in the preceding paragraph. This difference of language corresponds with the difference between the "leave to appeal" which the Colonial Supreme Courts are empowered to grant on being satisfied that an intending appellant to the Privy Council has complied with the requirements of the Orders in Council, and the "special leave to appeal," which must be obtained from the Privy Council itself in order to carry to the Privy Council a case not coming within the Orders in Council.

(1) "**Special leave to appeal.**"—On a motion to rescind an order granting special leave to appeal, in a civil case involving £200, to the High Court of Australia it was held that the rule to be applied by the High Court in dealing with applications for special leave to appeal in cases below the appealable amount should be substantially that laid down by the Judicial Committee of the Privy Council in the case of *Prince v. Gagnon*, 8 App. Cas., 103. In that case their Lordships were not prepared to advise Her Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominion, save where the case was of gravity involving matter of public interest or some important question of law or affecting property of considerable amount, or where the case was otherwise of some public importance or of a very substantial character; per Griffith, C.J., in *Hannah v. Dalgarno* (1903), 1 C.L.R., 1.

PRIVY COUNCIL PRECEDENTS.—The principles according to which the Privy Council has granted special leave to appeal will no doubt guide the High Court in granting special leave under this sub-section. Thus special leave was granted by the Privy Council where the question raised involved the constitutional rights of a colonial legislative assembly; *Speaker of Legislative Assembly of Victoria v. Glam*, L.R. 3 P.C., 560. Leave was granted in other cases where the question raised was one of general importance; *Carter v. Molson*, 8 App. Cas., 530; even although the subject in dispute was under the appealable value; *Lindo v. Barrett*, 9 Moo. P.C., 456; *Rogers v. Rajendro Dutt*, 13 Moo. P.C., 209. See also, cases cited *Mess' Digest*, vol. 3, col. 620. In advising a grant of special leave to appeal the Judicial Committee considers the general importance of the question, whether it has caused great differences of judicial opinion in the courts below, and the extent to which the decision has been based upon English authorities; *Robinson v. Canadian Pacific Railway* (1892), A.C., 481. It must clearly appear that there is a point of general law proper to be determined upon appeal and a substantial case upon the merits; *Gour Monce Dossee v. Jogendro Narain Chowdury*, 12 Jur. (N.S.), 477. Special leave will be refused as a rule in a case involving only an issue of fact; *Canada Central Railway v. Murray*, 8 App. Cas., 574.

In *St. Andrew's Church of Montreal v. Johnston*, 3 App. Ca., 159, special leave of appeal from the Supreme Court of Canada was refused in a case where the amount at issue was only \$300, and where the issue between the parties related simply to the legal construction and effect of a particular contract, and where no general principle was involved, and no other cases were necessarily affected by the decision complained of.

In *Valin v. Langlois*, 5 App. Ca., 115, an important constitutional question was involved as to the validity of a Dominion Act; but special leave to appeal from two concurrent judgments of the Courts in Canada, affirming the validity of the Act, was refused, it appearing that there was no substantial question to be decided, nor any doubt of the soundness of the decisions, nor any reason to apprehend difficulty or disturbance from leaving the decisions untouched.

PROCEDURE.—Special leave may be granted upon motion *ex parte*. The order for special leave may be rescinded on motion by the respondent; Rules of Court, Part II., sec. 4, r. 2; *Hannah v. Dalgarno*, *supra*; cf. *Sibnarain Ghose v. Hulodhur Doss*, 9 Moo. P.C., 354. The proper course where special leave to appeal has been unduly given is to move for the rescission of the order of special leave before any expense has been incurred; *Saurageau v. Gauthier*, L.R., 5 P.C., 494. Where special leave to appeal is granted, the Court can impose such conditions as it thinks fit; Rules of Court, Part II., sec. 4, r. 2; cf. *In re Ghor*, 8 Moo. P.C., 276. Leave was granted by the Privy Council on the terms of the appellant's submission to pay the costs of the appeal in any event, if so directed; *Montreal Gas Co. v. Cadieux* (1898), A.C., 718.

On the hearing of the motion for special leave to appeal, the evidence must be given on affidavit as the High Court requires (Rules of Court, Part II., sec. 4, r. 2). The appellant should state in the fullest and frankest manner all the circumstances of the case; *Lyll v. Jardine*, L.R., 3 P.C., 318; *Mussoorie Bank v. Raynor*, 7 App. Cas., 321; *Bulkeley v. Scutz*, L.R., 3 P.C., 196; *Baudains v. Jersey Banking Co.*, 13 App. Cas., 832.

CRIMINAL CASES.—In criminal cases leave will only be granted in special circumstances—where it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done; *Reg. v. Bertrand*, L.R., 1 P.C., 520; *Re Dillet*, 12 App. Ca., 459; *Ex parte Deeming*, 1892, App. Ca., 422; *Kops v. Reg.* (1894), App. Ca., 650; *Ex parte Carew* (1897), App. Ca., 719. Special leave to appeal from a criminal conviction after a trial by jury cannot be granted where there is evidence for the jury, and no fact is established sufficient to countervail the findings and verdict; *Ex parte Aldred* (1902), A.C., 81.

(j) **“Judgment given before this Act.”**—The preceding part of sec. 35 deals with cases in which there may be an appeal to the High Court from judgments which are made, or given after the commencement of the *Judiciary Act*; this part of the section purports to specify the cases in which there may be an appeal to the High Court from judgments which are given, or made before the commencement of the Act. In *Hannah v. Dalgarno*, the plaintiff obtained judgment in the Supreme Court of New South Wales for £200 damages. On 20th August, 1903, 5 days before the *Judiciary Act* received the Royal assent, a rule nisi for a new trial was discharged by the Full Court. On 15th October the High Court granted *ex parte* special leave to appeal. On 10th and 11th November an application was made to the High Court (Griffith, C.J., and Barton and O'Connor, JJ.), to rescind the special leave on the grounds that the Court had no jurisdiction to entertain the appeal, the judgment having been given before the passing of the *Judiciary Act*, and the case not falling within any of the cases enumerated in the first paragraph of sec. 35 of that Act as cases in which appeals may be brought from judgments given before the passing of the Act; and that the nature of the case was not such as to justify the grant of special leave, even if the Court had jurisdiction to entertain the matter. Referring to the first ground the Court in giving its decision said: “With regard to judgments pronounced by the Supreme Courts in the exercise of their State jurisdiction before the passing of the *Judiciary Act*, the right of appeal to the High Court was to be subject to the same conditions and restrictions as appeals to His Majesty in Council, until those conditions and restrictions were altered by the Parliament. In the meantime, if the matters were not of the appealable amount, or the prescribed time had elapsed before the actual establishment of the High Court, without an assertion by the unsuccessful party of his right to appeal to His Majesty, his right was gone. But as to appeals from federal Courts or Courts exercising federal jurisdiction, other considerations arise. There is much force in the contention, that the jurisdiction of those Courts was, from the first, intended to be subject to the right of appeal to the High Court, and that that right, being a right conferred by the Constitution itself upon suitors, could not be lost or taken away by mere inaction of the Parliament, or in any other way except by actual legislation prescribing exceptions. The temporary inability to exercise a statutory right by reason of a delay which, from the nature of the case, was inevitable, in the passing of an Act to determine the number of judges of the High Court, could not, in this view, operate as a destruction or diminution of the right itself. The provisions of sec. 7 of the *Claims against the Commonwealth Act* 1902, which empowered the Attorney-General to require the postponement of an appeal from a judgment given under the Act until a time when, it may be suggested, the High Court would probably have been established, seem also to suggest the assumption

on the part of the Parliament that the Court when established would have jurisdiction to deal with judgments which had been already pronounced." 1 C.L.R., p. 11; 9 A.L.R. (C.N.), pp. 85-87. The appellate sections of the *Judiciary Act* were held not retrospective; *Colonial Sugar Company v. Irvine* (1904), S.R. (Q.), 18.

FINALITY OF APPEALS TO THE HIGH COURT.—The *Judiciary Act* is necessarily silent as to the extent to which the judgments of the High Court in its appellate jurisdiction are final; this is determined by the Constitution itself. By that instrument, sec. 73, it is declared that the judgments of the High Court in all such cases shall be final and conclusive. These words, however, standing alone would not be sufficient to limit the prerogative of the Crown in Council to entertain appeals; *Theberge v. Laundry*, 2 App. Cas., 102. By the Canadian Act 38 Vict., ch. 11, s. 47, judgments of the Supreme Court of Canada are made final and conclusive in all cases; held that these words left the Crown's prerogative entirely untouched; *St. Andrew's Church, Montreal, v. Johnston*, 3 App. Cas., 159. All doubts on such questions have, however, been removed by the Constitution of the Commonwealth. The finality of High Court decisions in some matters is made clear and absolute, whilst in other matters it is modified and limited by the express provision of sec. 74. In certain constitutional cases it is made clear and absolute by the first paragraph of sec. 74, which states that "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council." The finality of High Court decisions is qualified by the last paragraph of sec. 74, which enacts—"Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise, by virtue of Her Royal Prerogative, to grant special leave to appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitations shall be reserved by the Governor-General for Her Majesty's pleasure."

As to constitutional questions which come within the prohibition, "no appeal shall be permitted," see *Quick and Garran's Annot. Const.*, pp. 753 to 763

Power of Court.

New trials.
U.S. 726.

36. The High Court in the exercise of its appellate jurisdiction shall have power to grant a new trial (a) in any cause in which there has been a trial whether with or without a jury.

(a) "**New Trial.**"—Under the practice prior to the *Judicature Act*, the principal grounds for granting a new trial were—(1) a mistake on the part of the Judge, such as misdirection, and improper admission or rejection of evidence; (2) mistake or misconduct on the part of the jury, such as giving a verdict contrary to the evidence or weight of evidence, and giving excessive or insufficient damages; (3) default, mistake, or misconduct on the part of, or surprise or accident affecting, the parties or their representatives.

Under the *Judicature Act*, Or. 39, r. 6, it is provided that a new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them, unless, in the opinion of the Court to which the application is made, substantial wrong or miscarriage has been thereby occasioned in the trial; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Court may give final judgment as to part, and direct a new trial as to the other part only. This rule has not been embodied either in the *High Court Procedure Act* or in the Rules in the Schedule to the Act, so that in cases decided in the original jurisdiction of the High Court decisions under the *Common Law Procedure Act* may still be regarded, whilst in cases coming into the High Court in its appellate jurisdiction from State Courts, in which the above rule is in force, the decisions under the *Judicature Act* may be applicable. For cases as to new trials decided in Victoria before 1888, see *Hamilton's Judicature Act*, pp. 23, 30.

OPINION OF PRESIDING JUDGE.—The Court of Appeal in England has held that the granting of a new trial ought not to depend on the question whether the learned Judge who tried the action was or was not satisfied with the verdict, or whether he would have come to the same conclusion, but whether the verdict was one such as reasonable men ought to have come to; *Solomon v. Bitton*, 8 Q.B.D., 176. This appears to be the principle on which the Privy Council would act in such a case; *Humphrey v. Nowland*, 15 Mo. P.C., 343. On an application to the Full Court of Victoria that the verdict be set aside and judgment entered for the defendant, or, failing that, that a new trial be ordered, it was held that, as the Judge had expressed himself as thoroughly dissatisfied with the result of the trial, and as it appeared from the undisputed facts and from the documentary evidence, as well as from the acts and conduct of the plaintiff, that the verdict was one which reasonable men should not have returned, it should be set aside, and judgment entered for the defendant; *Scoun v. Haworth*, 24 V.L.R., 313. As to *Solomon v. Bitton*, see *Metrop. Ry. Co. v. Wright*, 11 A.C., 156.

Although the opinion of a Judge who tries a case is by no means conclusive, yet, in determining whether a verdict is against evidence, his opinion must be taken into serious consideration, and should form one of the elements upon which the Court is to base its determination; *Cross v. Goode*, 8 N.S.W.L.R., 255; c.f. *O'Keefe v. Gogerty*, 10 S.C.R. (N.S.W.), 15; *Parsons v. Hannan's Star G.M. Ltd.*, 2 W.A.L.R., 73. But the Court will not grant a new trial where there is evidence to support the verdict, even though the Judge who presided at the trial is very strongly against the conclusion at which the jury arrived; *Miller v. Dalgetty*, 3 W.N. (N.S.W.), 27. See also *Friend v. Smith*, 5 N.S.W.L.R., 59.

APPEAL FROM FINDING OF JUDGE.—Where the Judge below has had an opportunity of seeing the demeanour of the witnesses and testing their veracity, it is almost impossible for the Court, without these advantages, to say that his finding is against the evidence; *Wallis v. Wallis*, 12 N.S.W.L.R. (D.), 1; *The Alice*, 5 Moo. P.C. (N.S.), 343.

EVIDENCE BOTH WAYS.—The Full Court will not grant a new trial in an action for libel unless the words used necessarily bear a libellous meaning. If

the words may or may not bear a libellous meaning, and the jury have found that they do not, the Court will not interfere; *Geach v. Hall*, 16 V.L.R., 386. The fact that there is evidence on both sides as to the main question in the case is not a conclusive reason why the Court should not grant a new trial. The real test seems to be whether the verdict returned by the jury is such a one as in the opinion of the Court a jury might reasonably find upon the evidence before it. Consequently, where the oral evidence pointed both ways, but the evidence for the defendant stood on a superior plane to that of the evidence for the plaintiff, inasmuch as it was supported by documents and by facts which were not in dispute between the parties, the Court ordered the verdict in the plaintiff's favour to be set aside and a new trial to be held; *Scoven v. Haworth*, 24 V.L.R., 313.

AGAINST THE WEIGHT OF EVIDENCE.—The first question is whether there was any evidence to go to the jury, and the rule on this point is that, if the evidence was such that no jury could reasonably find a verdict, then there was no evidence to go to the jury. The second question is whether the verdict was against the weight of evidence, and on this point the rule is that the verdict will not be disturbed, unless it is one which a jury, viewing the evidence reasonably, could not properly find; *Ferrand v. Bingley, &c., Local Board*, 8 Times L. Rep., 70. Compare also, *Martin v. Council of the Municipality of Brisbane*, (1894) A.C., 249. Generally a verdict will not be disturbed as against the weight of evidence, unless it is one which a jury, viewing the whole evidence reasonably, could not properly find; *Phillips v. Martin*, 15 App. Cas., 193. Where the case is perfectly plain, and where it is necessary to conclude either that the jury have found against the evidence, or that they have, it may be, acted upon a misunderstanding or a misconception, the Court should retain the right of setting aside a verdict which is manifestly wrong, and of granting a new trial; *Rocke v. Wilson*, 13 V.L.R., 833.

In order to set aside a verdict as being against evidence, such evidence must not only be unsatisfactory, but unreasonable and unjust, and such as reasonable men ought not to have found; *Cross v. Goode*, 8 N.S.W.L.R., 255; *Cooper v. Rutherford*, *ib.*, 192; *Goldsbrough v. McMahon*, *ib.*, 265; *Elliott v. Gilchrist, Watt & Co.*, 3 Q.L.J., 93; *Ewan v. Queensland I. Co. Ltd.*, 4 Q.L.J., 208; *Cox v. The E. S. & A. Bank Ltd.*, 1903. S.R. (Q.), 294. It will not be disturbed when there is evidence on both sides, unless the jury have acted in such an unreasonable manner that the verdict is necessarily unjust; *Williams v. Union Bank of Australia*, 5 Q.L.J., 114. See also *Gardiner v. The City Mutual Life Ass. Society*, 21 N.S.W.L.R., 251.

A new trial will not be granted on this ground unless the evidence greatly preponderates against the view the jury have taken, and more especially in a case where fraud is charged; *Thompson v. United Insurance Co.*, 2 W.N. (N.S.W.), 16. But where the findings are against the evidence and weight of evidence and unreasonable, a new trial will be granted; *Christie v. Harvey*, 3 W.A.L.R., 21; *Parsons v. Hannan's Star Gold Mines Ltd.*, 2 W.A.L.R., 73. It would appear that the practice in New South Wales is that the Court will hesitate to grant a new trial on this ground when the sum in dispute is small; *Hoffnung v. Simpson*, 2 N.S.W.L.R., 133; except where the Court is of opinion that the verdict is demonstrably wrong; *Helmore v. Simons*, 19 W.N. (N.S.W.), 25. Where there is not a tittle of evidence to support a verdict, no matter how small the amount, it should be set aside; *per* Stephens, J., *Borough of Kiama v. Charles*, 15 N.S.W.L.R., 497.

A new trial was granted where the sole witness for the plaintiffs was uncontradicted and of unimpeached character, but was disbelieved by the jury, whose verdict was for the defendant; *Cohen v. Slade*, 12 S.C.R. (N.S.W.), 88.

Where the question in an action for trespass was one entirely for the jury, who had viewed the *locus*, the Court refused to interfere with the verdict of a jury, the question being the dedication of a highway; *Butchart v. Dodds*, 12 S.C.R. (N.S.W.), 371.

Though the jury had a view, the Court granted a new trial on the ground that the verdict was against evidence; *Von Meyer v. Borough of East St. Leonards*, 3 W.N. (N.S.W.), 13.

Where an issue has been directed by the Court of Equity to a jury, and the evidence shows that the issue is a matter of doubt, and the Court is satisfied that the matter has been properly investigated and placed fully before the jury, the Court will not interfere with their finding, although it may not be such a finding as the Court itself would have come to upon the evidence; *Macnamara v. Minister for Works*, 15 N.S.W.L.R. (E.), 173.

Where the Court is satisfied from the answers of the jury to questions submitted to them by the Judge that they never properly applied their minds to the issues which they had to try, the Court will grant a new trial, even though not satisfied that the verdict is demonstrably wrong; *Stevens v. London Assurance Corporation*, 20 N.S.W.L.R., 153.

DAMAGES EXCESSIVE.—The Court will not grant a new trial on the ground that the damages awarded by the jury were excessive although, in the opinion of the Court, the damages were extravagantly excessive, unless it be shown that the jury acted under the influence either of undue motives or of some gross error or misconception on the subject; *Bailey v. Hart*, 9 V.L.R. (L.), 66, commented on; *The Grosvenor Hotel Co. v. Castellano*, 11 A.L.T., 106. A new trial will not be granted in an action for libel on the ground that the damages awarded by the jury are excessive, even if the Full Court thinks they are excessive, unless they are so monstrously so as to be beyond all reason; *Brown v. Syme*, 16 V.L.R., 392. Where a plaintiff has been awarded excessive damages by a jury, the Court may, on a motion by defendant for a new trial, assess the damages at what seems to the Court a fair sum, and give the plaintiff the option of either accepting that sum or submitting to a new trial; *Greener v. Abrahams*, 2 A.L.R., 13.

The Court will not interfere with the verdict of a jury on the ground that damages are excessive unless they are outrageous or calculated on a wrong principle; *Campbell v. Commercial Bank*, Knox (N.S.W.), 14; or unless the damages are very much heavier than the justice of the case deserves; *Hodson v. O'Brien*, 2 W.N. (N.S.W.), 2; or unless, having regard to all the circumstances of the case, the Court think that the damages are so large that no jury could reasonably have given them; *Lees v. Erans*, 12 N.S.W.L.R., 7.

The Court is very chary of exercising its power on this ground; *Fleming v. Commissioner for Railways*, 2 W.N. (N.S.W.), 56. But a new trial will be granted where the damages are not fair and reasonable, and bear no proportion to the position of the plaintiff and the nature of the injuries; *McWhannell v. Commissioners for Railways*, 10 W.N. (N.S.W.), 101.

In some cases where the damage was excessive the Court has made it a condition that if the plaintiff accepts a reduced sum the new trial will be refused; *Buckle v. Horden*, 11 W.N. (N.S.W.), 70. Where in an action for tort against a sheriff he neglected to tender evidence in mitigation of damages, the Court held that they were not justified in saying the jury were manifestly wrong or the damages were such as reasonable men should not have given; *O'Connor v. Sheriff of Queensland*, 4 Q.L.J., 213.

INSUFFICIENT DAMAGES.—In an action tried before a jury, the jury assessed the damages at £55; the Judge before whom the trial was held was dissatisfied with the verdict. On a motion for a new trial, it was held that, unless the defendant consented to judgment for an additional amount of damages a new trial would be granted; *Little v. T. K. Bennet and Woolcock Ltd.*, 26 V.L.R., 247.

Where the finding by the jury was unreasonable a re-assessment was allowed; *Williams v. Union Bank of Australia Ltd.*, 5 Q.L.J., 99. In actions for defamation where the verdict has been found for the plaintiff, the Court will not grant a new trial on the ground of the smallness of the damages awarded; *Donkin v. The Brisbane Newspaper Co. Ltd.*, 3 S.C.R. (Q.), 186.

Where it was uncertain whether the damages in an action would or would not, if properly assessed, have exceeded an amount paid into Court, a new trial was ordered; *McNutt v. Widgiee D.B.*, 7 Q.L.J., 75.

FRESH EVIDENCE.—A new trial will not be granted upon the ground that fresh evidence has been discovered which could not with reasonable diligence have been discovered before the trial, unless that fresh evidence is so conclusive as to make it practically certain that the verdict would be different if it were adduced; *Young v. Kershaw*, 81 L.T., 531. On an application for a new trial on the ground that the respondent was taken by surprise at the trial, and that fresh evidence has been discovered since the trial, it must be clearly shown that if the additional testimony had been brought forward at the first trial, it ought to, or would, have led the jury to a different conclusion from that at which they arrived; *Malpas v. Malpas*, 11 V.L.R., 670.

A new trial will not be granted where the fresh evidence, if given, would not necessarily turn the case in applicant's favor; *Johnston v. Looney*, 5 W.N. (N.S.W.), 10. On application for a new trial on this ground, the question is whether there is a probability of the new evidence inducing a new jury to upset the verdict of the first jury; *per* Lilley, C.J., in *Gorrie v. Goldsmith*, 4 Q.L.J., 37; *Brandon v. Bouell*, 3 S.C.R. (Q.), 12.

MISDIRECTION.—A new trial will not be granted on the ground of misdirection, unless the misdirection amounts to a withdrawal from the jury of a question which ought to have been submitted to them and might have influenced their verdict, or unless some substantial wrong or miscarriage of justice has been occasioned thereby; *Bray v. Ford* (1896), App. Cas., 44. The Court, in granting an application for a new trial on the ground of misdirection, may, if of opinion that appellant's counsel should have drawn attention to the misdirection, order that the costs of the application shall abide the event of the new trial; *Ritchie v. The Victorian Railways Commissioner*, 25 V.L.R., 272. For other cases on misdirection see *Annual Practice*, 1903, p. 538.

Where a Judge has wrongly or imperfectly directed a jury, the verdict, whether right or wrong, must be set aside; *Strickland v. McCulloch*, 8 L.R. (N.S.W.), 324; *Low v. Fairfax*, 16 W.N. (N.S.W.), 113.

IMPROPER ADMISSION OF EVIDENCE.—The improper reception of evidence is not sufficient ground for a new trial where there is abundant evidence, properly received, to support the verdict, and the error appears to have been compensated for by the Judge's charge to the jury; *Greener v. Abrahams*, 2 A.L.R., 13. On an application for a new trial upon the ground of the improper admission of evidence, the burden of showing that some substantial wrong or miscarriage has been occasioned in the trial thereby is upon the applicant; *Boyett v. Boyett*, 19 A.L.T., 41.

Where it clearly appears that there was evidence, independently of that improperly received, to support the verdict, the Court will not order a new trial on the ground of the improper reception of such evidence; *Gordon v. The Bank of N.S.W.*, 7 N.S.W.L.R., 122; nor will it be granted if such evidence is not material, nor if, though it be material, there is, independently of it, evidence to support the verdict; *Cross v. Goode*, 8 N.S.W.L.R., 255. If the evidence improperly received could not have affected the minds of the jury, or where apart from such evidence the verdict could not have been supported if it had been found the other way, it will be refused; *Goodsell v. National Bank of Australasia*, 11 N.S.W.L.R. (E.), 156.

Where at a trial, evidence had been admitted which was irrelevant, and which tended to distract the minds of the jury from the question of fact which they had to try, and to create in their minds an undue bias in favour of the defendants, a new trial was directed to be had; *Bartley v. Row*, 1 S.C.R. (Q.), 33. Compare also *Cameron v. Hay*, 1 S.C.R. (N.S.W.), App., 7.

A new trial will not be granted if a Judge allows evidence to be given in reply which might have been given in chief; *R. v. Chantler*, 12 N.S.W.L.R., 116.

Where a document rejected at the trial as inadmissible by mistake was sent to the jury with other exhibits, a new trial was granted, but on terms as to costs; *Hegherty v. National Life Association*, 8 W.N. (N.S.W.), 122.

A new trial will not be granted for the improper rejection of evidence where the evidence, if received, would become immaterial, nor where, assuming the rejected evidence to have been received a verdict in favor of the party for whom it was offered would have been clearly and manifestly against the weight of evidence and certainly set aside upon application to the Court as an improper verdict; *Baynes v. Osborne*, 4 S.C.R. (Q.), 1.

TAMPERING WITH JURY PANEL.—To tamper with the jury panel is as much an interference with justice as to tamper with the jury who actually try the case; *Parker v. Falkner*, 10 N.S.W.L.R., 7.

Where a magistrate took part in revising a jury list and afterwards brought an action before a jury taken from the same list, though the defendant was not entitled as a matter of right to a new trial, yet with a view to the purity of the administration of justice the Court granted a new trial on certain disputed issues; *Ricketson v. Barbour*, 1 S.C.R. (N.S.), N.S.W., 193.

QUESTIONS DECIDED IMPROPERLY BY JUDGE.—Where on a trial by a Judge and jury a Judge decided a question not left by the parties to him to decide, new trial was ordered; *Cashman v. No. 7 North Golden G.M. Co.*, 7 Q.L.J. 152.

GROUND NOT RELIED ON AT THE TRIAL.—Where a particular course of proceeding is adopted at the trial, the unsuccessful party will not be allowed on application for a new trial to come into Court and set up a new ground altogether; *Brown v. Fletcher*, 5 N.S.W.L.R., 393. If apart from misdirection or wrong admission or rejection of evidence any point of law arises on the evidence, it may be taken afterwards; *Dwyer v. Herman*, 2 N.S.W.L.R., 280. A party is not entitled to a new trial upon any ground founded upon his own default; *Hempstead v. Gardiner*, 5 S.C.R. (Q.), 109.

UNAUTHORIZED VIEW.—It would appear that a view of the *locus* by a jury without any order of the Judge is a ground for a new trial; *Gritton v. The Railway Commissioners*, 18 W.N. (N.S.W.), 86.]

INCONSISTENT FINDINGS.—A new trial will be ordered where the findings of the jury are inconsistent; *Christie v. Harvey*, 3 W.A.L.R., 21; *Goldsworthy v. The Brilliant Extended G.M. Co.*, 9 Q.L.J., 254; *Rapken v. Adams*, 23 V.L.R., 187.

PERVERSE VERDICT.—Where a jury base their verdict not on the legal merits of the case, but upon what they consider fair, the verdict will not stand; *Conlon v. M'Guigan*, 5 N.S.W.L.R., 205; see also *Spencer v. Harris*, 11 N.S.W.L.R., 21. Where a jury are rightly instructed as to the law, but disregard the directions of the Court, the granting of a new trial is a matter of right which the injured party may demand, notwithstanding a second concurring verdict; *Fitch v. The Liverpool and London F. and L. Ins. Co.*, 1 S.C.R. (N.S.W.), 269.

AFFIDAVITS BY JURORS.—Jurymen have no right to disclose what takes place in consultation, and, therefore, the Court cannot look at affidavits made as to what took place in the jury room; *Hegherty v. National Life Assn.*, 8 W.N. (N.S.W.), 122. The Court will not receive affidavits by jurors as to the misconduct of the jury in arriving at a verdict, nor affidavits of other persons containing statements made by jurors to the deponents as to misconduct; *Clamp v. Lyne*, 11 W.N. (N.S.W.), 108; *Brennan v. Russell* 1 S.C.R. (N.S.W.), 300. The Court will, however, hear an affidavit made by a jurymen who is charged with misconduct; *Perdriau v. Moore*, 9 N.S.W.L.R., 143. Where a plaintiff is charged with improperly conversing with jurymen at a view, the affidavits of jurors are admissible to show what really occurred; *Slocombe v. Municipal Council of Sydney*, 5 W.N. (N.S.W.), 14.

OMISSION OF QUESTIONS TO JURY.—Where the Privy Council were of opinion that the questions necessary for the proper determination of the case had not been left to the jury, a new trial was ordered; *Brabant & Co. v. King*, (1895) A.C., 632. See also as to new trials on this ground, *Commercial Bank of Australia Ltd. v. Boyd*, 4 Q.L.J., 14; *Union Bank of Australia Ltd. v. Raine*, 6 Q.L.J., 58; *Low v. Fairfax*, 16 W.N. (N.S.W.), 113.

CROSS-ACTIONS.—Where cross-actions involving the same questions of law and fact are separately tried with the result that contradictory verdicts are obtained,

if the evidence at each trial is so fairly balanced that a jury might reasonably find either way, both cases ought to be tried again, not separately, but together. The Court, in such a case, can neither be called upon to exercise the functions of a jury, nor to issue contradictory decrees. It was held by the Privy Council, affirming the judgment of the Supreme Court of New South Wales (7 N.S.W.L.R., 207), however, in this case, that one of the verdicts should be set aside as against the weight of evidence; *A. S. N. Co. v. Smith*, 10 N.S.W.L.R., 150.

CONCLUDED BY RECENT DECISION.—In New South Wales it was held that a motion for a rule absolute for a new trial concluded by a decision in a different case pronounced after the rule *nisi* was granted, will be dismissed with costs; *McPhillamy v. Green*, 4 W.N. (N.S.W.), 31.

VIEW OF LOCUS BY COURT.—In New South Wales on a new trial motion in a land resumption case, on the ground that the damages were excessive, as the evidence before the Court was very conflicting, the members of the Court visited the land, and, after seeing it, came to the conclusion that the damages were excessive, and ordered a new trial; *O'Brien v. Minister of Works*, 2 W.N. (N.S.W.), 99.

INFORMATION OBTAINED OUT OF COURT.—Where it was shown that one of the jurors trying a collision case improperly conversed, during an adjournment of the Court, with one of the witnesses near the scene of the collision, as to the causes which led thereto, a new trial was granted, but on terms; *Perdriau v. Moore*, 9 N.S.W.L.R., 143. If any information pertinent to the case be given to a juror at a view, there must be a new trial, even though such information be true in fact; *Smith v. Nield*, 10 N.S.W.L.R., 171.

MISCONDUCT OF JUROR.—The Court will not grant a new trial on the ground of misconduct of a juror unless there is clear and precise evidence before the Court to show that the juror has been guilty of misconduct; *Cox v. Bath*, 14 N.S.W.L.R., 263.

INTEREST OF JUROR.—Where on a trial of an issue to decide the ownership of property, one of the jurors was a judgment creditor of a person whose assets would be materially increased or decreased by the result of the verdict, and the juror made an affidavit that he was not aware at the time of the trial that the verdict could have the slightest influence on his claim against his judgment debtor, a new trial was refused; *Bartley v. Rowe*, 1 S.C.R. (Q.), 33.

MISCONDUCT OF PARTIES WITH JURORS.—A casual conversation between a juror and a party during the hearing of an action on matters entirely foreign to the action, is not a ground for new trial; *Butt v. M'Donald*, 7 Q.L.J., 68; cf. also *Tubrett v. Wakely*, 10 N.S.W.L.R., 77; *Chapman v. Broughton*, 5 W.N. (N.S.W.), 33. A new trial was refused where the ground was that the defendant, whilst the jury were having a view, frequently addressed them, and invited them to dinner, and gave them fruit; *Doyle v. Sattler*, 7 W.N. (N.S.W.), 53.

Where a defendant during the trial accosted a jurymen with whom he was not acquainted, and said "Are you going to see the land?" to which the jurymen replied, "I think not, but I believe we could settle the matter better by doing so," the case was sent down for a new trial; *McRoberts v. Carter*, 9 N.S.W.L.R., 458.

INSANITY AT TRIAL.—Where the defendant, whose sanity was unsuspected, by his eccentric conduct caused a verdict for large damages to be returned against him, a new trial was granted; *Teas v. Kennedy*, 2 N.S.W.L.R., 55.

BANKRUPTCY OF A PARTY.—In an action on a cheque the jury found a verdict for the defendant, and after a rule nisi for a new trial had been obtained the defendant became bankrupt. The motion for the rule absolute was adjourned to enable the plaintiff to apply to the Judge in Bankruptcy for leave to proceed, and leave having been obtained, the Court made the rule absolute. On the motion for the rule absolute, the official assignee not appearing, it was held that the bankrupt was not entitled to be represented; *Henry v. Barninger*, 13 W.N. (N.S.W.), 128.

GENERAL VERDICT, SEVERAL COUNTS.—In New South Wales it has been held that, where there are several counts in the declaration, and the jury return a general verdict, the verdict cannot stand unless there is evidence to support each count; *Lamb v. West*, 15 N.S.W.L.R., 120. This rule, however, does not apply when the whole case is identical, and the amount of damages necessarily the same under each count; *Hodge v. Rudd*, 19 W.N. (N.S.W.), 119.

SURPRISE.—In New South Wales it was held that the strict rules of law as to surprise do not bind the Equity Judge. If facts are brought to his knowledge after the trial of an issue which have a disturbing influence on his mind it is his duty to have the matter further investigated; *Goodsell v. National Bank*, 11 N.S.W.L.R. (E.), 32.

It is never granted on the ground of surprise unless a clear case is made out by the party moving; *New Zealand Ins. Co. v. South Australian Ins. Co.*, 1 S.C.R. (N.S.), N.S.W., 214; or the verdict is substantially wrong; *Seirl v. Hill*, 1 W.N. (N.S.W.), 75. A new trial was refused on the ground of surprise where the defendant at the trial did not ask for a postponement; *Lakeman v. Jardine*, 2 W.N. (N.S.W.), 17. Surprise by putting in unregistered deeds; see *Stuart v. Barayenne*, 2 N.S.W.L.R., 315; 4 N.S.W.L.R., 365.

A new trial on this ground is not a matter of right, but it is in the discretion of the Court; *Newcomen v. Corrigan*, 1 N.S.W.L.R., 358.

Where a successful party was afterwards convicted for perjury, a new trial was granted on terms; *Longworth v. Campbell*, 3 N.S.W.L.R., 329.

The jurisdiction of the High Court to hear and determine applications for new trials must be exercised by a Full Court; *Jud. Act*, sec. 20. On the granting of a new trial the Court may impose conditions and direct admissions and may grant it generally or on some particular points; *H.C.P. Act*, sec. 14. As to procedure on application for a new trial, see *Rules of Court*, Part II., *Appeal Rules*.

Form of judgment on appeal.
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37. The High Court in the exercise of its appellate jurisdiction may affirm reverse or modify the judgment appealed from, and may give such judgment as ought to have been given in the first instance, and if the cause is not pending in the High Court may in its discretion award execution (a) from the High

ourt or remit the cause to the Court from which the appeal is brought for the execution of the judgment of the High Court; and in the latter case it shall be the duty of that Court to execute the judgment of the High Court in the same manner as if it were its own judgment.

(a) **Execution.**—As to execution against or by the Commonwealth or others, see *Jud. Act*, secs. 65, *et seq.*; as to execution generally, see *H.C.P. Act*, s. 26.

PART VI.—EXCLUSIVE AND INVESTED JURISDICTION.

38. The jurisdiction of the High Court shall be (a) exclusive of the jurisdiction of the several Courts of the States in the following matters:—

Matters in which jurisdiction of High Court is exclusive.

- (a) Matters arising directly under any treaty (b);
- (b) Suits between States (c), or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State;
- (c) Suits by the Commonwealth (d), or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;
- (d) Suits by a State (e), or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth;
- (e) Matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal Court.

(a) **“Exclusive.”**—Under the Constitution (sec. 77, II.), Parliament is authorized to define the extent to which the jurisdiction of any Federal Court is to be exclusive “of that which belongs to or is invested in the Courts of the States.” This power is confined to those “matters mentioned in the last two sections,” viz., secs. 75 and 76. This exclusiveness of jurisdiction can only be effected by two steps or stages of legislation. First the Court to be made exclusive must have jurisdiction conferred either by the Constitution or by some federal law, and, secondly, the extent of such exclusiveness must be defined. Thus Parliament can, at once, declare that the jurisdiction of the High Court in matters enumerated in sec. 75 is exclusive of “that which belongs to or is invested” in the State Courts, but it could not declare that the jurisdiction of the High Court in matters enumerated in sec. 76 is exclusive until it has actually conferred jurisdiction on the High Court in those matters.

The words "belongs to or invested in" must refer either to jurisdiction inherently belonging to, or, by State law invested in, the State Court. Federal jurisdiction is not defined by the Constitution, and it is not quite clear what concurrent jurisdiction the State Courts may have in matters of federal jurisdiction. It has been contended that under the Constitution, clause 5, all federal laws could be enforced in the Courts of the States. Sec. 77 seems to imply (1) that the State Courts possess some concurrent federal jurisdiction of which it may be desirable to deprive them and (2) that the State Courts may lack some concurrent jurisdiction with which it may be desirable to clothe them.

If a case be within the ordinary jurisdiction of a State Court it has been held, in the United States, that the State Court could take cognizance of it notwithstanding that it arose under rights acquired by the Constitution or a federal law; *Kent Com.*, I., 397. In *Claffin v. Houseman*, 93 U.S., 130, it was ruled that an assignee in bankruptcy, under federal bankrupt law, could sue in a State Court. It has been settled wherever the judicial power of the United States is not, in its nature, exclusive of State authority it may, at the option of Congress, be made so; *Kent Com.*, I., 397; *Cooley Const. Lim.*, 18. This provision of the Australian Constitution is, therefore, merely an explicit enactment of what, in the Constitution of the United States, has been held to be implied. *Quick and Garran's Annot. Const.*, p. 802.

(b) "**Treaty.**"—This sub-section does not give the High Court original jurisdiction over treaties—that is given by the Constitution, sec. 75 (i.)—it merely declares that the jurisdiction is exclusive of the State Courts. As to the nature of this judicial power, see note to *Jud. Act*, sec. 30, p. 104.

(c) "**Between States.**"—The Constitution, sec. 75 (iv.) gives the High Court original jurisdiction of matters between States, subject, however, to the Parliament passing laws conferring rights to proceed against a State in matters within the limits of the judicial power. The right of one State to bring a suit against another state is conferred by the *Judiciary Act*, sec. 59 (*infra*); sec. 38 (b) merely declares the jurisdiction of the High Court in such suits to be exclusive.

(d) "**By the Commonwealth.**"—The Constitution, sec. 75 (iii.), gives the High Court original jurisdiction in matters in which the Commonwealth is a party. This sub-section declares that in suits by the Commonwealth against a State the High Court shall have exclusive jurisdiction, but in suits against the Commonwealth authorized by sec. 56 (*infra*) the High Court has concurrent jurisdiction with the Supreme Courts of States.

(e) "**Suits by a State against the Commonwealth.**"—The Constitution (sec. 73) authorizes Parliament to pass a law conferring right to proceed against the Commonwealth. This power has been exercised in the *Judiciary Act*, sec. 57, which enables a State, in respect of a claim founded on contract or tort, to bring a suit against the Commonwealth in the High Court; sec. 38 (d), declares this jurisdiction to be exclusive.

(f) "**Mandamus or prohibition.**"—The Constitution, (sec. 75, v.), gives the High Court original jurisdiction in matters of mandamus, prohibition and injunction against federal officers or a federal Court. By this sub-section that jurisdiction is made exclusive in mandamus and prohibition.

See also note to sec. 33, *supra*.

39. (1) The jurisdiction of the High Court in matters (a) mentioned in the last preceding section shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.

Federal jurisdiction of State Courts in other matters.

(2) The several Courts (b) of the States shall within the limits (c) of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested (d) with federal jurisdiction, in all matters (e) in which the High Court has original jurisdiction or in which original jurisdiction can be conferred on it, except as provided in the last preceding section, and subject to the following conditions and restrictions:—

(a) Every decision of the Supreme Court of a State, or any other court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall be final and conclusive except so far as an appeal (f) may be brought to the High Court.

(b) Wherever an appeal (g) lies from a decision of any Court or Judge of a State to the Supreme Court of the State, an appeal from the decision may be brought to the High Court.

(c) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit (h) any appeal from such Court or Judge.

Special leave to appeal from decisions of State Courts though State law prohibits appeal.

(d) The federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate, or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction.

Exercise of federal jurisdiction by State Courts of summary jurisdiction.

(a) “In matters not mentioned in the last preceding section.”—When the Judiciary Bill was first introduced into the House of Representatives, it proposed to confer upon the High Court all the “additional original” jurisdiction permitted by the Constitution, sec. 76. Subsequently, however, the “additional original” jurisdiction of the High Court was reduced to that included in sec. 76, sub-sec. 1, viz., “any matter arising under the Constitution, or invoking its interpretation.” The original bill also declared what

should be the exclusive jurisdiction of the High Court in terms almost the same as they now appear in sec. 38. The bill then went on to declare, as it now declares in sec. 39, that the jurisdiction of the High Court "in matters not mentioned in the last preceding section" shall be exclusive of "the jurisdiction of the several Courts of the States," &c. On the construction of sec. 39, as it now stands, the question arises—What are the "matters not mentioned in the last preceding section?" In the original Bill, it was quite obvious that the "matters not mentioned in the last preceding section" were the residue of the original jurisdiction of the High Court left, after deducting the matters defined in the preceding section, such as those relating to treaty and suits by and against the Commonwealth and the States. Such residue included matters "between residents of different States," "arising under the Constitution," "arising under Federal laws," "Admiralty and Maritime jurisdiction," &c. These matters were also declared to be within the exclusive jurisdiction of the High Court, subject, however, to a conditional grant of original jurisdiction to the State Courts. This form of drafting was adopted for special reasons, which will be found fully explained in a note to subsequent words in the section now under review, viz., "invested with Federal jurisdiction." If the Bill had remained unaltered as regards the original jurisdiction of the High Court, the construction of sec. 39 (i.), although somewhat ambiguous, would have been workable, but after the alteration denying the High Court so much original jurisdiction, its meaning has been made very obscure. What are the "matters not mentioned in the last preceding section?" The only intelligible answer that can be given is—(1) matters referred to in the Constitution, sec. 75, except those enumerated in the *Judiciary Act*, sec. 38; and (2) matters referred to in the Constitution, sec. 76 (1). It is submitted that sec. 39 does not purport to confer on the High Court original jurisdiction additional to that granted by sec. 30; it is placed there wholly in the exercise of power conferred by the Constitution, sec. 77 (ii.). It would not be proper to read into sec. 39 (1) the comprehensive words of sec. 39 (2) "in all matters in which the High Court has original jurisdiction, or in which original jurisdiction can be conferred upon it." One paragraph of this section is limited, and is placed there for a special purpose, whilst the other invests the State Courts with original jurisdiction in all matters whatsoever, except those enumerated in the preceding section.

(b) "**The several Courts of the States.**"—The several Courts of the States within the limits of their several jurisdictions are by sec. 39 invested with original Federal jurisdiction in all judicial matters contemplated by the Constitution, except those mentioned in sec. 38, which exclusively belong to the High Court.

VICTORIA.—The powers of the Supreme Court of Victoria may, under the *Supreme Court Act* 1890, be exercised either by a single Judge or by the Full Court. A single Judge sitting in Court may, subject to appeal in civil and mixed matters to the Full Court, hear and determine all motions, causes, actions, matters, and proceedings not required by law to be heard in the Full Court. By the Amending Supreme Court Act of 1891, a single Judge can dispose of all proceedings by way of appeal, or case stated, or orders to review, from Courts of General Sessions and Petty Sessions respectively. The Full Court can hear and determine all appeals from a single Judge of the Court, from the Court of Mines,

The Court of Insolvency, County Court, and proceedings by way of appeal or review from General and Petty Sessions, respectively, referred to it by a single Judge; also all motions on points reserved and cases stated, whether civil or criminal. The Supreme Court has also general criminal jurisdiction to inquire into indictable offences.

In certain proclaimed districts in the State there are Courts of General Sessions of the Peace having jurisdiction to inquire into a limited list of indictable offences; also to hear appeals from Courts of Petty Sessions. The decision of a Court of General Session is final in such appeals, except that the Court may refer any of the matters on which its decision is final to the Supreme Court for special determination. Under the *County Court Act 1890*, County Courts have jurisdiction to hear and determine all personal actions in which the amount or value or damages sought to be recovered do not exceed £500. Any party dissatisfied with a judgment or order of a Court may appeal to the Supreme Court in the form of a case stated or agreed to by the parties, or settled by the Judge. There is also an alternative form of appeal to the Supreme Court by motion.

Courts of Petty Sessions are constituted under the *Justices Act 1900*, sec. 57. They have summary jurisdiction in minor criminal matters, and civil jurisdiction in matters up to the money value of £50. When any person is aggrieved by the summary conviction of any Court of Petty Sessions, by which he is ordered to be imprisoned or penalized in the sum of £5, he can appeal to the General Sessions. The decision of the Court of General Sessions is final in most cases; the Session, however, can state a case for the determination of the Supreme Court, in which event that Court finally settles the matter. A person aggrieved by a summary conviction or order, may, instead of appealing to the Sessions, apply to a Supreme Court's Judge in Chambers for an order to review on the ground that there has been some error or mistake on the part of the Court, or that the Court had no jurisdiction to convict or make the order. No order to review is granted in respect of any complaint for a civil debt recoverable summarily, (1) unless the sum involved exceeds £5, or (2) unless some important question or principle of law is in issue, or (3) unless there was no jurisdiction to make the order. After a notice of appeal to the General Sessions has been given, the parties, by consent and by order of a Judge of the Supreme Court, may state the facts of the case for the determination of the Supreme Court. Among other Victorian Courts may be mentioned the Court of Mines, Warden's Court, Court of Insolvency, Court of Marine Enquiry, from all of which appeals in some form or other may be made to the Supreme Court.

The question may arise as to whether "Justices" sitting in Petty Sessions, exercising summary jurisdiction, constitute "Courts" within the meaning of sec. 39 (2) so as to be invested with federal jurisdiction. In Victoria, prior to the passing of the Act No. 1458, several decisions were given by the Supreme Court which drew a marked distinction between Justices sitting and acting as such, and a Court of Petty Sessions composed of Justices; In the *Shire of Benalla v. Wallder*, 16 V.L.R., p. 681; 12 A.L.T., 71, the Full Court held, that under the *Local Government Act 1874*, sec. 285, any Justice or Justices sitting as magistrates had power to hear complaints for rates up to any amount, but that the jurisdiction of Justices sitting as a Court of Petty Sessions was, by the *Justice of the Peace*

Act 1887, sec. 59, limited to complaints for rates not exceeding £50. In *Murphy v. Rosman*, 18 A.L.T., 71, a case arising under the *Marriage Act 1890*, Mr. Justice Hood held, that an order of maintenance made by a Court of Petty Sessions purporting to be in pursuance of sec. 43 of that Act which gives two Justices authority to make such an order was invalid; such an order could be made by two Justices only and not by a Court of Petty Sessions. In *Hannan v. Simpson*, 22 V.L.R., p. 532, the Full Court sustained that decision; *per curiam*: "The Legislature has drawn a clear distinction between Justices and a Court of Petty Sessions." It was in consequence of these decisions that an Act was passed by the Victorian Parliament conferring on Courts of Petty Sessions jurisdiction to do any act or exercise any power previously conferred by statute on any one or more Justices; *Justices Act 1896* (No. 1458).

In *Buckingham v. Weatherup*, (1903) 25 A.L.T., 61, a summons was issued in Victoria signed by a Justice under the *Marriage Act*, sec. 42, and served on the defendant in Western Australia, calling on him to show cause why he should not support his illegitimate child. The point was raised that the summons was not a writ of summons issued out of a Court of Record within the meaning of the *Service and Execution of Process Act 1901*. On an order to review, it was held that it had not been issued out of any Court at all, and consequently the Court of Petty Sessions in Melbourne had no jurisdiction to make a maintenance order against the defendant. The inconvenient consequences of this decision could be avoided by such inter-State summonses being issued by a Court of Petty Sessions instead of by a Justice.

SOUTH AUSTRALIA.—The Supreme Court of South Australia is composed of a Chief Justice and two Puisne Judges. Its jurisdiction extends to all matters of law and equity and the application of all remedies. The *Supreme Court Act 1878* (No. 116) and the rules framed thereunder now regulate the practice and procedure, and are generally based on the practice under the English Judicature Acts, upon which, in the matter of immediate relief, they are in some respects in advance. Law and equity are, as in England, fused. Proceedings are by action, or by petition, motion, or summons. Actions are tried before a Judge or Judges without a jury, or, when either party requires it, before a Judge and jury. A good deal of the business is disposed of by a Judge in Chambers.

Appeals from the Supreme Court are regulated by Act No. 31 of 1855-6 amended by Act No. 15 of 1865, and may be taken either to the local "Court of Appeals" of the State or to the Privy Council. The local Court of Appeals is comprised of the Governor and the executive Council (with the exception of the Attorney-General), but is almost never resorted to. Its judgments are subject to appeal to the Privy Council. Appeals lie to the Privy Council against judgments, orders, decrees, or sentences of the Supreme Court or Court of Appeals in respect of amounts over £500, or respecting property or civil rights of the value of £500 or upwards, on notice within fourteen days and security for costs being given.

The South Australian Local Courts, which are to an extent analogous to the District Courts and County Courts of other States, were established by Act No. 15 (1861) which has been amended and consolidated into the *Local Courts Act 1886*. The Local Courts are divided into those of full, and those of limited, jurisdiction.

Local Courts of full jurisdiction are composed of either a Judge of the Supreme Court of the State, with or without a jury, or of a Special Magistrate and two Justices of the Peace, or of a Special Magistrate and a jury; and Local Courts of limited jurisdiction consist of a Special Magistrate or two Justices of the Peace. The business is so apportioned that all cases in the Local Court of Adelaide of full jurisdiction, in which the amount involved is £100 and upwards, are heard by a Judge of the Supreme Court with or without a jury. For the purpose, the Supreme Court is proclaimed the place of sitting. The jurisdiction is defined in section 30 of the *Local Courts Act 1886*. Local Courts of full jurisdiction have cognizance of all personal actions where the debt or damage claimed is not more than four hundred and ninety pounds, whether on a balance of account or otherwise; and in any action for recovery of a balance of account the Court has jurisdiction, if the original claim has been reduced to four hundred and ninety pounds, or less, by payment or by any sum for which the plaintiff in his plaint or particulars of demand gives the defendant credit. Local Courts of limited jurisdiction have cognizance of all like actions where the debt or damage claimed is not more than twenty pounds, whether on a balance of account or otherwise; and such Courts have jurisdiction where the original claim shall have been reduced to twenty pounds or less by payment or by any sum for which the plaintiff in his plaint or particulars of demand gives the defendant credit.

Any Local Court may have jurisdiction to any amount by written consent of the parties, but only Local Courts of full jurisdiction have cognizance of an action in which the title to any corporeal or incorporeal hereditament or easement shall incidentally come in question, or involving a question in relation to a will or settlement. In any action in the Supreme Court for a cause within the jurisdiction of a Local Court, in which, if for contract, less than £490 is recovered, or for trespass, detinue, or trover, less than £100 is recovered, the costs on the Local Court scale only are recoverable, unless Supreme Court costs are certified for. Ejectment proceedings in respect of land under the *Real Property Act*, and of the value of not more than £400, may be taken in the nearest Local Court of full jurisdiction, and a claim for mesne rents or profits may be joined if, with the value of the land, it does not exceed £400. Local Courts of full jurisdiction have also jurisdiction in cases for the recovery of tenements where neither the value of the premises nor the rent exceeds £100 a year. Under sec. 22 of the *Insolvent Act 1886*, certain Local Courts have been proclaimed Local Courts of Insolvency, for the purpose the Special Magistrate acting as Commissioner of Insolvency.

In the sense of being able to apply equitable remedies Local Courts have no equitable jurisdiction, but the word "law" is defined as including "equity." Under sec. 109 of the *Local Courts Act 1886* any party to an action may, by leave of the Court, avail himself of a defence in equity.

Actions of £30 and upwards may be removed into the Supreme Court, but an order for transfer is seldom applied for. The presiding Judge or Special Magistrate may reserve any point of law arising in any case in a Local Court for the decision of the Supreme Court; while in claims exceeding £30, and in all actions of ejectment, an appeal lies to the Supreme Court where a party is dissatisfied with the determination or direction of the Local Court on a point of law, or upon the admission or rejection of any evidence. The appeal is made in the form of a rule or order to show cause why the judgment or order of the Local

Court should not be set aside and a new trial had between the parties, or why the judgment should not be entered for or varied in favour of the party applying, the rule shortly stating the grounds. The appellant must give security by bond or deposit to the amount of £20.

Local Courts of full jurisdiction hear appeals against assessments under the District Council and Corporation Acts, and from orders in respect of similar matters under various Acts. Appeals from summary convictions or orders are regulated by the Act No. 6 of 1850, and the *Justices Procedure Amendment Act* (No. 208), 1883-4, and lie to the Local Court of Adelaide. The right to appeal generally conferred by the Special Act under which the conviction is obtained or the order made, and under No. 6 of 1850, sec. 30, is exercised by notice within a month to the Local Court of Adelaide of full jurisdiction, which, under the *Local Courts Appeal Amendment Act* 1887 (No. 411), may be, and usually is, constituted of a Judge of the Supreme Court sitting alone. The Local Court may reserve a point of law for the decision of the Supreme Court, or, under sec. 40 of the *Justices Procedure Amendment Act* 1883-4, the Court having summary jurisdiction may, after the regular hearing, on application in writing within seven days, state a case on a point of law for the opinion of the Supreme Court.

NEW SOUTH WALES.—The Supreme Court of New South Wales is constituted and established under the Imperial Act 4 Geo. IV., c. 96, by the Charter of Justice (13th October, 1823) and 9 Geo. IV., c. 83. The Court consists of a Chief Justice and six other Justices. The Chief Justice and four Puisne Justices are charged primarily with the Common Law jurisdiction of the Court; one Justice (the Chief Judge in Equity) has primary jurisdiction in equity matters, and one Judge has primary jurisdiction in probate and bankruptcy matters; one of the Common Law Judges has primary jurisdiction in divorce and matrimonial causes. Vice-Admiralty jurisdiction, conferred by Imperial Statutes, is exercised by the Chief Justice or a deputy. The Court has also criminal jurisdiction, as stated in the above Act 9 Geo. IV., c. 83. Besides its original jurisdiction, the Supreme Court is a Court of appeal from inferior Courts and Justices in Petty Sessions, and may control such Courts by writ of mandamus or prohibition, may order causes to be removed to it by writ of *certiorari*, and may grant writs of *habeas corpus* and *quo warranto*.

The constitution of Circuit Districts and Circuit Courts is provided for in the *Supreme Court and Circuit Courts Act* 1900, which consolidates previous enactments. A Circuit Court has jurisdiction to try all civil actions, and to hear and determine crimes and misdemeanours committed in New South Wales. A Circuit Court is presided over by a Supreme Court Judge.

The constitution and jurisdiction of District Courts are stated in the *District Courts Act* 1901, which consolidates previous enactments. There are six District Court circuit districts, administered by seven District Court Judges, two of the Judges having jurisdiction within the metropolitan district. The jurisdiction of District Courts is limited to personal actions in which the amount claimed does not exceed £200. An appeal lies to the Supreme Court, either in the form of a case agreed upon by the parties, or by rule *nisi*. District Court Judges are *ex officio* Chairmen of Quarter Sessions within their respective circuits, and have jurisdiction to try all except capital offences.

Courts of Petty Sessions are presided over by two or more Justices of the Peace. In Sydney, Newcastle, and Parramatta districts there are Stipendiary Magistrates who have the powers of two Justices; in country districts there are Police Magistrates who also have the powers of two Justices. Justices have jurisdiction under the *Justices Act* 1902 (Consolidating Act) in cases of indictable offences to commit offenders for trial; they have also a summary jurisdiction under that Act to make convictions and orders in respect of certain offences. An appeal lies from the summary jurisdiction of Justices to the Supreme Court or to Quarter Sessions. Courts of Petty Sessions have, under the *Small Debts Recovery Act* 1899 (Consolidating Act), jurisdiction in all places outside the metropolitan District in actions for debt not exceeding £30, and for damages not exceeding £10. The amount recoverable in the metropolitan district is limited to £10. The jurisdiction may by consent of parties be extended from £10 to £30. One Justice may in the country districts exercise the jurisdiction where the amount claimed does not exceed £5.

QUEENSLAND.—The Supreme Court of Queensland is constituted under *The Supreme Courts Acts* 1867 to 1903. The number of Judges must not be less than four nor more than five. There are at present four Judges, and it is left to the discretion of the Executive Council to appoint a fifth or not. The Chief Justice and the senior puisne Judge are resident at Brisbane. A Northern District and a Central District have been constituted. A Judge of the Supreme Court has been appointed for each of these districts. The Judges are designated the Northern Judge and the Central Judge. The Central Court and Northern Court, without prejudice to the jurisdiction, powers and authority exercisable in any Circuit Court within the Central District, or the Northern District, as the case may be, are held at Rockhampton and Townsville respectively. At each of these places there is an office of the Supreme Court, and all necessary officers have been appointed. Writs or other process issued out of either office are returnable in the office whence issued. But every writ or other process has full force and effect, and may be enforced at any place within the State. Subject to the provisions of the *Supreme Court Act* of 1895, every Judge of the Court may exercise in any part of Queensland at which the Supreme Court or a Circuit Court is appointed to sit, all the jurisdiction and authorities of a Judge of the Supreme Court. The Supreme Court has the same jurisdiction as the superior Courts of Common Law and the High Court of Chancery in England, or any Judge thereof, has in the administration of the law of England; 31 Vict., No. 23, s. 21. The Court possesses also an equitable, ecclesiastical and criminal jurisdiction; *ib.*, secs. 22, 23, 24. By *The Matrimonial Causes Jurisdiction Act* of 1864 (28 Vict., No. 29), and *The Matrimonial Causes Act* of 1875 (39 Vict., No. 13), a jurisdiction is constituted within the Supreme Court in matters matrimonial. The Supreme Court is also the "Colonial Court of Admiralty," under 53 & 54 Vict., c. 27. By *The Insolvency Act* of 1874 the Supreme Court is made the Court of Insolvency.

An appeal lies to the Full Court from every order made by a Supreme Court Judge in Court or Chambers; *Judicature Act* 1876, sec. 10. No order made by any Judge by the consent of parties, or as to costs only, which are by law left to the discretion of the Judge, shall be subject to appeal except by leave of the Judge making the order; sec. 9. For statutory provisions as to appeals generally, see *Supreme Court Acts* 1892, 1893, 1895. Appeal lies also to Full Court in criminal cases; see *Criminal Code*, 63 Vict., No. 19, sec. 668, *et seq.*

An appeal lies to the Full Court in matrimonial matters; *The Matrimonial Causes Jurisdiction Act* of 1864 (28 Vict., No. 29, s. 34); *The Matrimonial Causes Act* of 1875 (39 Vict., No. 13, s. 3); and from the Full Court to the Privy Council; 28 Vict., No. 29, s. 51; in insolvency matters; *The Insolvency Act* of 1874 (38 Vict., No. 5, s. 15); and in admiralty matters; *The Colonial Courts of Admiralty Act* 1890 (53 & 54 Vict., No. 27, s. 5); and from the Full Court to the Privy Council; *ib.*, sec. 6.

The practice and procedure of the Supreme Court closely resembles that under the English *Judicature Act* and rules.

District Courts are constituted under *The District Courts Act* 1891 (55 Vict., No. 33). They are vested with a civil and criminal jurisdiction. These Courts have jurisdiction in all personal actions in which the amount claimed does not exceed £200, but not in any case in which the title to land, or the validity of a devise or a bequest or limitation under a will or settlement is in question. They have jurisdiction in certain cases of partnership, intestacy or a legacy, in which the amount sought to be recovered does not exceed £200. Equitable claims for debt or damages up to £200 may be recovered in these Courts.

An appeal lies from a judgment of the District Court to the Supreme Court under sec. 144 *et seq.* of *The District Courts Act* 1891 (55 Vict., No. 33); (1) in an action or matter where the sum sued for exceeds £30; (2) in ejectment where the value or rent exceeds £30 a year; (3) in replevin where rent for which the distress was, or might have been made, exceeds £30; (4) in interpleader where the sum claimed, or value of the goods, exceeds £30. In certain cases the Judge of a District Court, sitting on appeals, may state a special case for the opinion of the Supreme Court; *ib.*, sec. 159. Criminal appeals lie to Supreme Court; see *Criminal Code* (63 Vict., No. 9), s. 668, *et seq.*

The Governor in Council is empowered by the *Justices Act* of 1886 (50 Vict., No. 17), to appoint places in proclaimed districts in which Justices may hold Courts of Petty Sessions. The Act defines the procedure and jurisdiction of the Court and the general duties of justices. Many of these duties are performed out of sessions. By the *Small Debts Act* of 1867 the Courts of Petty Sessions are made Small Debts Courts, and given a jurisdiction in civil actions for the recovery of any debt, demand, or damage, whether liquidated or unliquidated, to an amount not exceeding £50; 58 Vict., No. 10, sec. 2. An appeal lies from the Court of Petty Sessions sitting as a Court of Summary Jurisdiction to the Supreme Court. The *Justices Act* of 1886 (50 Vict., No. 17), provides for appeals to the Supreme Court by applications to quash a conviction or order; sec. 209, *et seq.*; and by way of special case; sec. 226, *et seq.* By sec. 237 an appeal lies also to the District Court; see also *Criminal Code* (63 Vict., No. 9), sec. 674. Appeals lie to the District Court from Court of Petty Sessions sitting as a Small Debts Court where the sum sued for amounts to £10 or upwards; 31 Vict., No. 29, s. 34.

Warden's Courts are constituted under *The Mining Act* of 1898 (62 Vict., No. 24), sec. 100, *et seq.* Appeals lie by case stated to the Supreme Court or District Court; sec. 136; or by way of quashing order in the Supreme Court; sec. 139; or by appeal to the District Court in the manner provided by sec. 141, *et seq.*

TASMANIA.—The Supreme Court of Tasmania consists of a Chief Justice and two puisne Judges, and was created and constituted by the Charter of Justice of

4th March, 1831, granted pursuant to the Huskisson Act (9 Geo. IV., c. 83). The Supreme Court was assigned jurisdictions, both original and appellate, as follows, viz. :—(1) Common Law ; (2) Equity ; and (3) Ecclesiastical. In its Common Law Jurisdiction it entertains on its civil side all civil causes, and exercises jurisdiction over all inferior Courts and civil corporations such as was formerly exercised by the Court of King's Bench in England. Courts of Nisi Prius or civil sittings are held at regular intervals at Hobart and Launceston, presided over by one or more of the Judges of the Supreme Court. An appeal lies from all decisions of the Judge or Judges to the Full Court, sitting in Banco, but the verdict of a Judge on a question of a fact under 19 Vict., No. 16, cannot be questioned on the ground of being against the weight of evidence. In this jurisdiction it also takes cognizance of all criminal causes. Sessions of oyer and terminer and general gaol delivery or criminal sittings are held at regular intervals, presided over by one or more of the Judges. No appeal lies from a criminal conviction, but the Court may, in its discretion, reserve difficult questions of law for the determination of the Full Court, such questions being referred by a case stated under 45 Vict., No. 14. In its equity jurisdiction the Supreme Court entertains all causes and matters which, prior to the *Judicature Act* 1873, would have been assigned in England to the Court of Chancery. Under 19 Vict., No. 23, the equitable jurisdiction may be exercised by a single Judge, with the exception that the Full Court alone can make final decrees in causes instituted by bill or claim. And all orders, declarations, and acts of a single Judge sitting in equity may be reversed, discharged, or altered by the Full Court. In its ecclesiastical jurisdiction, now regulated by the *Probate Act* 1893 (57 Vict., No. 14), the Supreme Court is assigned the supervision of the appointment of personal representatives and other matters formerly cognizable by the Court of Probate in England until 1875. All matters relating to probate and administration may be disposed of by a single Judge sitting in Chambers, subject to his decision being reversed, discharged, or altered on appeal by the Full Court.

The Supreme Court was constituted a Court for Divorce and Matrimonial Causes by *The Matrimonial Causes Act* (24 Vict., No. 1). In it was vested all jurisdiction then vested in or exercisable by any ecclesiastical Court or person in England, with the modification that the decree for a divorce *a mensâ et thoro* was abolished, and a decree for a judicial separation substituted.

A further jurisdiction was assigned to the Supreme Court by *The Bankruptcy Act* 1870 under which the Court regulates, in accordance with the Act, the distribution of the property of a debtor who has rendered himself amenable to the bankruptcy laws. This jurisdiction is exercised by a single Judge of the Supreme Court who may delegate part of his powers to the Registrar. An appeal lies from all decisions of the Judge or Registrar to the Full Court in equity. The Supreme Court appoints its own terms and sittings. Its sittings for the trial of civil and criminal issues are customarily presided over by a single Judge. In term the Full Court exercises all its several jurisdictions, entertains appeals from inferior Courts, directs new trials, issues writs of prohibition and mandamus, and superintends all civil corporations, grants writs of *habeas corpus*, hears demurrers and equity suits and special cases, determines suits and matters in its matrimonial causes jurisdiction, and exercises originally, on occasions, the several jurisdictions cognizable and usually administered by a single Judge. The Supreme Court also exercises the Admiralty jurisdiction conferred upon Colonial Courts by the Imperial Act, 53 & 54 Vict., c. 29.

By the *Local Courts Act* 1896 (60 Vict., No. 48), amended by subsequent Acts, several minor Courts were organized. The Courts of Requests can entertain personal actions for the recovery of debts and demands to such amounts not exceeding £50, as the Governor in Council appoints, also ejectment suits. If held before a Commissioner, who is a practitioner, to an amount not exceeding £100. The Court of General Sessions can decide cases of the same kind up to the money value of £50, or up to such lesser amount as the Governor in Council thinks fit. Sittings of the Supreme Courts, presided over by a Supreme Court Judge, may be held, as directed by the Governor, to hear actions under the procedure defined by the Act for the recovery of debts and demands exceeding £10, and not exceeding £300, also ejectment actions. But the minimum does not apply to actions of ejectment brought under the Act in the Supreme Court. The Police Magistrates in Hobart and Launceston are Commissioners of Courts of Requests in their respective cities in which debts and demands not exceeding £10 may be sued for. From each of the jurisdictions established by the *Local Courts Act* there is the right of appeal to the Supreme Court, either by special case, or by a rule or order for a writ of prohibition, or by a rule or order for a writ of mandamus.

Justices in Petty Sessions can make convictions or orders under the Act 19 Vict., No. 8 (1855). A person aggrieved by a conviction or order may resort to one of several remedies:—(1) Under 19 Vict., No. 10 (1855), he may appeal to the Court of General Sessions of the Peace, the decision of which is final, and not open to review in any Court, by a writ of *certiorari*, mandamus or otherwise; or (2) he may under the same Statute apply to the Supreme Court for a rule or order calling upon the justices and the prosecutor to show cause why a writ of prohibition should not be issued on the ground of error, mistake, or want of jurisdiction; (3) under Act 24 Vict., No. 5 (1860), as amended by 41 Vict., No. 14 (1877), a party dissatisfied with a conviction or order, as erroneous in point of law, may apply to the justices to state and sign a case for the determination of the Supreme Court, and, if the justices refuse, the Supreme Court may order them to state a case.

The constitution, jurisdiction, and procedure of Courts of Mines held before a Commissioner of Mines is defined in *The Mining Act* 1900 (64 Vict. No. 61, ss. 142 to 163). An appeal to the Supreme Court or a Judge thereof lies from the Court of Mines by way of special case; secs. 164 to 172 (*ibid*).

WESTERN AUSTRALIA.—The Supreme Court of Western Australia was established by Royal Charter in 1861, and the main provisions relating to its constitution and jurisdiction are now contained in the *Supreme Court Act* 1880 (44 Vict., No. 10). It has jurisdiction in Common Law (civil and criminal), Equity and Ecclesiastical cases; also in bankruptcy and insolvency, and in matrimonial causes. The Full Court, consisting of the Chief Justice, or two or more Judges of the Court, exercises appellate jurisdiction in specified matters. *The Small Debts Ordinance Act* 1863 (27 Vict., No. 21), amended by 38 Vict., No. 13, constituted Local Courts similar to those in some of the other Australian States to decide small debts cases. The Supreme Court can review the orders and proceedings of such Courts by various methods of procedure, such as *certiorari*, prohibition and mandamus. *The Justices Act* 1902 (2 Edw. VII., No. 11), consolidates the law relating to the exercise of summary jurisdiction by justices sitting as justices or Courts of Petty Sessions. Persons summarily convicted and sentenced to imprisonment, or fined more than ten pounds, may appeal either to the Supreme Court or to a Court of General

Sessions constituted under 9 Vict., c. 4; 12 Vict., c. 2; 50 Vict., c. 27. By the *Goldfields Act* 1895 (59 Vict., No. 40), Warden's Courts having jurisdiction to deal with mining cases were established. A Court of Mining Appeals, consisting of three Judges of the Supreme Court, was organized to hear and determine appeals from the decisions of Wardens; sec. 85.

(c) **"Within the limits of their several jurisdictions."**—The several Courts of the States within the limits of their several jurisdictions are invested with federal jurisdiction; thus the Supreme Courts of the States are invested with federal jurisdiction to deal with federal matters in the same way as if such matters arose under State laws. The Supreme Courts are, of course, clothed with broad and comprehensive powers and are not subject to limitations, either as to locality, subject matter, or otherwise, like Courts of inferior jurisdiction. The subordinate Courts of a State are, however, subject to limitations as to locality, subject matter, and otherwise. County Courts, District Courts, and Local Courts are limited in respect of causes of action which they can entertain, also the amount involved. They are limited also with respect to locality in as much as proceedings in such Courts have generally to be commenced in the Court nearest to where the cause of action originated, or where the defendant resides. Courts of Petty Sessions and summary jurisdiction are similarly limited with respect to locality and subject matter. The meaning of the words "within the limits of their several jurisdictions" is therefore obvious. A Court of Petty Sessions, or a Court of Summary Jurisdiction can deal with a federal case if it is of the same kind as those which it can decide under State laws. The same remark applies to County Courts, District Courts, Courts of General Sessions and Local Courts. The Supreme Courts of the States have practically unlimited federal jurisdiction, but if a federal case were brought into a State Supreme Court, that Court would have power to remit it to an inferior State Court, in the same manner and subject to the same terms and conditions as it could remit a case arising under State law.

(d) **"Be invested with federal jurisdiction."**—The fifth covering clause of the *Constitution Act* provides that the Act itself and all laws made by the Parliament of the Commonwealth under the Constitution shall be binding on the Courts, Judges and people of every State. The Constitution, sec. 77 (ii.) enables the Parliament to make laws defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to, or is invested in the Courts of the States and (sub-sec. iii.) investing any Court of a State with federal jurisdiction. The Constitution, sec. 73, gives the High Court appellate jurisdiction as to judgments of Justices of the High Court exercising its original jurisdiction; of all State Courts exercising federal jurisdiction; all the State Supreme Courts, whether exercising federal jurisdiction or not. But the Constitution does not take away any concurrent right of appeal which may exist from a Supreme Court to the Privy Council, or from an inferior State Court to the Supreme Court.

In framing the Judiciary Bill it was desired to make it perfectly clear that in matters of federal jurisdiction there should be no appeal to the Privy Council except through the High Court. This required some care, as it was known that the contention was sure to be raised that there was a right of appeal given by Imperial Statute from any judgment of a State Supreme Court, of appealable amount, to the Privy Council. But it was thought to be clear that in matters in which the State jurisdiction was purely the creature and the gift of the Common-

wealth, in which the State Courts were merely acting as Federal Courts of first instance, the Parliament could prescribe the line of appeal. "Federal jurisdiction" is not defined by the Constitution and it is not quite clear what concurrent jurisdiction the State Courts may have in matters of federal jurisdiction. Sec. 77 (ii.) of the Constitution seems to imply that State Courts may possess some concurrent federal jurisdiction, from which it may be desirable to exclude them; a distinction is drawn between jurisdiction which "belongs" to the Courts of the States and jurisdiction with which the Courts of the States may be "invested": sub-sec. iii. implies that the State Courts may lack some concurrent federal jurisdiction with which it may be desirable to invest them.

To secure the control of the High Court over all matters of federal jurisdiction, it was thought advisable to first exclude the State Courts from any concurrent federal jurisdiction which they might inherently have, and then to invest them (as a gift from the Commonwealth) with any federal jurisdiction which it was desirable that they should have—so that there might be no room for the claim that a matter, which in one aspect was a matter of federal jurisdiction, was in another aspect a matter of State jurisdiction, in which an appeal might lie direct from a State Court to the Privy Council. This is the key to secs. 34, 35, 38 and 39 of the *Judiciary Act*. Sec. 34 confirms the jurisdiction given by sec. 73 of the Constitution to hear appeals from Justices of the High Court. Sec. 35 defines the jurisdiction given by sec. 73 of the Constitution to hear appeals from the State Supreme Courts—whether in the exercise of federal jurisdiction or not. Sec. 38 excludes the State Courts altogether from exercising jurisdiction in certain matters. Sec. 39 deals with other matters of federal jurisdiction—in which it is desirable that the State Courts should have federal jurisdiction, but equally desirable that they should only have it as a gift from the Commonwealth, and on terms laid down by the Parliament. This was done by first excluding them from jurisdiction in these matters, except as provided in the section, and then re-investing them with jurisdiction on certain conditions and subject to certain limitations. The first condition is that no appeal shall lie, in these matters, from a State Supreme Court except to the High Court (sec. 35). The second condition is that wherever an appeal lies to the Supreme Court, there is an alternative appeal to the High Court. The third condition is that there is an appeal as of grace in all cases to the High Court. The fourth condition relates to the constitution of a Court of summary jurisdiction. The second and third conditions are definitions of a part of the appellate jurisdiction of the High Court. But they are placed here, instead of in Part IV., to emphasise the fact that they form part of the conditions under which federal jurisdiction is vested in the State Courts.

(e) **"In all matters in which the High Court has original jurisdiction."**—The several Courts of the States are invested with federal jurisdiction in all matters in which the High Court has original jurisdiction under the Constitution; sec. 75; and in which original jurisdiction can be conferred upon it under the Constitution; sec. 76; except as provided in the *Jud. Act*, sec. 39. The result is that the several Courts of the States have, concurrently with the High Court, jurisdiction in the following matters:—

1. "Affecting Consuls, or any other Representatives of other countries:" Const., sec. 75 (II.)

2. "Between residents of different States:" Const., sec. 75 (IV.)
3. "In which a writ of injunction is sought against an officer of the Commonwealth:" Const., sec. 75 (V.)
4. "Arising under the Constitution, or involving its interpretation:" Const., sec. 76 (I.)
5. "Arising under any laws made by the Parliament:" Const., sec. 76 (II.)
6. "Of Admiralty or Maritime jurisdiction:" Const., sec. 76 (III.)
7. "Relating to the same subject matter claimed under the laws of different States:" Const., sec. 76 (IV.)

In our notes to the *Judiciary Act*, sec. 31, a detailed explanation of the judicial power with respect to matters "Affecting Consuls," "Between residents of different States," proceedings against "An officer of the Commonwealth," and cases "Arising under the Constitution or involving its interpretation," has been given. It will, therefore, be only necessary at this stage to consider the nature of the judicial power with respect to--(1) matters arising under federal laws; (2) Admiralty and Maritime jurisdiction; and (3) relating to the same subject matter claimed under different State laws.

"Arising under any Laws made by the Parliament."—Cases arising under laws made by the Parliament are such actions, claims, prosecutions, defences, or immunities, as grow out of the legislation of the Federal Parliament acting within the scope of its constitutional authority, whether those laws constitute the right, privilege, claim, or protection of the party in whole or in part, by whom they are asserted; *Story's Comm.*, § 1,647. A case may arise under the laws of the Commonwealth in a criminal as well as a civil proceeding, and a case arises under a law when it arises under the implication of the law; *Tennessee v. Davis*, 100 U.S., p. 257. In the case of *Osborne v. The Bank of the United States*, 9 Wheat., 738, the nature and extent of this grant of power were considered with very great care and ability by Chief Justice Marshall. In that case a suit was brought by the bank under a provision in its charter, issued under a federal law, allowing it to sue in the inferior federal Courts of the United States. It was insisted that that was not within the grant of judicial power in the Constitution; but it was held that, inasmuch as the corporation owed its existence to a law of the United States, any suit which it could bring might properly be said, in reference to this grant of power in the Constitution, to arise under a law of the United States, and that, therefore, it was competent to sue on account of the subject matter.

It has been held that if a controversy relates to the title or ownership of a federal patent or copyright, or to the construction or operation of any contract respecting the title, the case does not "arise under a law of the United States," in

the sense in which that phrase is used in the provision of the Constitution which defines the judicial power. The case arises under the patent or copyright laws of the Union when the controversy relates to the exercise of the exclusive right secured by those laws. There may be cases where the suit involves both the construction of a contract and the construction of the patent to which the contract relates. In these cases the jurisdiction of the federal Courts, on account of the subject matter, is not ousted, but, the patent itself being involved, it carries the whole case"; *Littlefield v. Perry*, 21 Wallace, 205; *Curtis Jurisd.*, U.S., pp. 162-3; *Pacific Railroad Removal Cases*, 115 U.S., p. 1.

"Admiralty and maritime jurisdiction."—The word "maritime" has been added to "admiralty" in order to guard against a narrow interpretation of the first word. The Admiralty jurisdiction, according to the Common Law of England, extends to all acts and torts done upon the high seas, and within the ebb and flow of tidal waters, and to all contracts touching trade navigation or business upon the sea, or the waters of the sea within the ebb and flow of the tide; *Story's Com.*, § 1,665. The jurisdiction conferred by the Constitution embraces two great classes of cases—one dependent upon locality, and the other upon the nature of the contract. The first respects acts or injuries done upon the high sea, where all nations claim a common right and common jurisdiction; or acts and injuries done upon the coast of the sea; or, at furthest, acts and injuries done within the ebb and flow of the tide. The second respects contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation. The former is again divisible into two great branches—one embracing captures and questions of prize arising *jure belli*; the other embracing acts, torts, and injuries strictly of civil cognizance, independent of belligerent operations; *Story's Com.*, 1,665-6.

In the United States it has been held that the grant in the Constitution is neither to be limited, or to be interpreted by what were cases of Admiralty jurisdiction in England when the Constitution was adopted, but extends the power so as to cover every expansion of such jurisdiction; *Waring v. Clarke*, 5 How., 41. All the navigable waters of the Atlantic coast which empty into the sea or into bays and gulfs that form a part of the sea, are as much within the Admiralty and Maritime jurisdiction of the United States as is the sea itself; *Transportation Co. v. Fitzhugh*, 1 Black., 574. The jurisdiction is not confined to tide waters, but extends to all lakes and rivers where commerce is carried on between States and foreign nations; *The Genessee Chief v. Fitzhugh*, 12 How., 443. All previous decisions limiting the Admiralty jurisdiction to tide waters are over-ruled, and the broad doctrine is announced that jurisdiction, as conferred by the Constitution, exists wherever ships float and navigation successfully aids commerce, whether internal or external; *The Hine v. Trevor*, 4 Wall., 555; *Quick and Garra's Annot. Const.*, p. 800.

This grant of power in the Constitution of the Commonwealth must be read in conjunction with the (Imperial) *Vice-Admiralty Courts Act* 1863 (26 & 27 Vict., c. 24), the *Vice-Admiralty Courts Act Amendment Act* 1867 (30 & 31 Vict., c. 45), and the *Colonial Courts of Admiralty Act* 1890 (53 & 54 Vict., c. 27). In New South Wales and Victoria there is still a Vice-Admiralty jurisdiction exercised by Imperial Courts under the Acts of 1863 and 1867. In every other Australian State the Act of 1890 has superseded and repealed the Acts 1863 and 1867, and

the Supreme Court of each of those States is a Colonial Court of Admiralty under that Act. An interesting question to be considered is, what is the effect of the Constitution of the Commonwealth, sec. 76 (iii.), in those States where, under the *Colonial Courts of Admiralty Act* 1890, the Supreme Courts have an Admiralty jurisdiction. That jurisdiction is clearly subject to the provisions, as to appeal, contained in the Constitution, and the provisions as to appeal contained in the *Colonial Courts of Admiralty Act* are superseded and impliedly repealed with respect to such States. Moreover, the Admiralty jurisdiction of the Supreme Courts of the States is subject to sec. 77 of the Constitution; so that the Federal Parliament could, after investing the federal Courts with such jurisdiction, make that jurisdiction to any extent exclusive, and thereby, to a corresponding extent, deprive the State Courts of jurisdiction; but this has not been done; the State Courts have been simply invested with jurisdiction under the Constitution which, apparently, may be concurrently exercised by them under the Imperial Act 1890.

With reference to Vice-Admiralty Courts existing at present in New South Wales and Victoria, it must be noted that they are Imperial Courts, established by Commission of the Admiralty. The jurisdiction exercised by each of the Vice-Admiralty Courts is an Imperial one, and is altogether independent of that of the Supreme Court, and of a different nature, and it is not competent for the local legislature to deal either with the extent thereof, or the practice and procedure observed therein; *Webb's Imperial Law in Vic.*, p. 68; *Vice-Admiralty Courts Amendment Act* 1867 (Imp.), sec. 16. In short, it would seem that the Vice-Admiralty Court is an Imperial Court "in" a State, and not, in any strict sense of the word, a Court "of" a State; and, therefore, that there is nothing in sec. 73 to give the High Court an appellate jurisdiction. The same reasoning would apply to exclude the Vice-Admiralty Courts from liability to have their jurisdiction cut down under sec. 77. This construction is strengthened by the general presumption against ousting existing jurisdiction, or creating new jurisdictions; see *Maxwell's Interp. of Statutes*, Chap. V. The difficulty, of course, may be removed at any time by the issue of Orders in Council, under the Imperial Act of 1890, directing the Act to be in force in New South Wales and Victoria, and thus superseding the Vice-Admiralty Courts altogether. On this question the case of *Attorney-General of Canada v. Flint*, 3 S.C. (Nova Scotia), 453; 16 S.C.R. (Can.) 707, and cited in *Wheeler's Confed. Law of Canada*, pp. 68-9, is instructive; *Quick and Garran's Annot. Const.*, p. 799.

"Relating to the same subject-matter."—The State Courts will have jurisdiction in any case in which the same subject-matter is claimed under the laws of different States. In the corresponding section of the Constitution of the United States the federal jurisdiction is limited to controversies between citizens of the same State claiming lands under grants of different States. The provision in the Australian Constitution is much wider. It refers not to land alone but to anything that may be the subject-matter of an action, and the claim need not be made under grants of different States, but under the laws of different States generally. In America the jurisdiction has been used to decide claims to land under grants of different States founded upon adverse pretensions of boundary; *Story*, § 1,696.

(f) **"An appeal may be brought."**—Every decision of the Supreme Court of a State, in the exercise of federal jurisdiction, is declared to be final and

conclusive "except so far as an appeal may be brought to the High Court." The object of this declaration is twofold—(1) to cut off the right of appeal to the Privy Council in federal cases; and (2) to enable an appeal to be brought to the High Court, subject to the terms and conditions laid down in the *Judiciary Act*, sec. 35. Thus, if it be a civil case, and the amount involved is £300 or more, there is an unqualified right to appeal; if under £300, the High Court may give special leave to appeal. If it be a criminal matter the High Court, if it thinks fit, may give special leave to appeal.

It was held by Cooper, C.J. (Real, J., dissenting) in an action arising out of the *Excise Act* 1901, that the provisions of the *Judiciary Act* 1903 dealing with the appellate jurisdiction of the High Court did not operate retrospectively, and consequently the plaintiffs were entitled to avail themselves of the appeal to His Majesty in Council which existed at the time the action was commenced; *Colonial Sugar Proprietary Co. Ltd. v. Irving* (1904), S. R. (Q.), 18.

(g) "**Wherever an appeal lies.**"—If a federal case originates in a State Court of inferior jurisdiction, or before any Judge of a State, and if under State laws an appeal lies from the decision of such Court or Judge to the Supreme Court of the State, then an appeal may be brought from the decision of such a Court or Judge exercising federal jurisdiction to the High Court.

An appeal includes any proceedings by which the Supreme Court reviews or corrects the decisions of an inferior Court, such as an order to review; *Stephens v. Abrahams*, 27 V.L.R., 753; 23 A.L.T., 233; and a writ of prohibition; *Ex parte Oesselman*, (1902) S.R. (N.S.W.), 149.

In New South Wales there are three ways in which a party aggrieved by the determination of a Court of Summary Jurisdiction may bring that determination before a higher Court—(1) by appeal to the Quarter Sessions under the *Justices Amendment Act* 1900 (No. 71), sec. 9; (2) by applying to the justices to state a case for the Supreme Court on a point of law under Act 45 Vict., No. 4; (3) by applying to the Supreme Court for a writ of prohibition under Act 14 Vict., No. 43, s. 12. The first two modes, it has been held, are undoubtedly appeal. In *Ex parte Oesselman*, *supra*, the question was raised whether a statutory prohibition was an appeal within the meaning of the federal *Customs Act*, sec. 248: "I also think that a statutory prohibition, though in form a prohibition, is in substance an appeal. In dealing with applications for a statutory prohibition the Court has always considered the same matter as in an application for a new trial, such as the effect of the wrongful admission or rejection of evidence, the wrongful determination of law, and, in fact, every matter that could properly be brought before the Court if in form it had been an appeal; . . . the federal Statute was intended to apply to the various procedures of the different States, and, therefore, we should give to the words used a liberal interpretation, so as to carry out the intention of the Legislature"; *per Owen, J.*, in the case of *Ex parte Oesselman*, *supra*. In *Stephens v. Abrahams*, *supra*, it was contended that an appeal under the federal *Customs Act*, sec. 248, did not include an order to review, but only an appeal from a Court of Petty Sessions to a Court of General Sessions. *Per Hodges, J.*: "In my opinion the word 'appeal' in sec. 248 should not receive a narrow construction. I think the federal Legislature intended that there should be a right of appeal in the case of dismissal, as well as in the case of conviction. It has provided a right

of appeal, and used that word in the widest sense, so that it may be applicable to the laws of each State within the Commonwealth, when there may be different procedures and different names given to the different procedures in the different States. Construing it with regard to this particular State the only mode by which there can be appeals from convictions, or orders of dismissals, is by an order to review, for it covers both in this procedure"; *Stephens v. Abrahams*, (1902) 27 V.L.R., 753.

(h) "**The law of State may prohibit any appeal.**"—If a federal case be heard in any inferior State Court, or by a State Judge, and if the law of the State prohibits any appeal from such Court or Judge to the Supreme Court, then the High Court may grant special leave to appeal to the High Court from the decision of such Court or Judge.

(i) "**Court of Summary Jurisdiction.**"—In a Court of Summary Jurisdiction federal cases can only be heard and decided by a Stipendiary, or Police, or Special Magistrate, or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction. It will be noted that summary jurisdiction in federal cases can only be exercised by a Court duly constituted under State laws; there is no judicial power vested in Special Magistrates apart from a Court.

PART VII.—REMOVAL OF CAUSES (a).

40. (1) Any cause or part of a cause arising (b) under the Constitution or involving its interpretation which is at any time pending in any Court of a State on appeal, may at any stage of the proceedings before final judgment be removed into the High Court under an order of the High Court, which may, for special cause shown, upon application by any party, or by or on behalf of the Attorney-General of the Commonwealth or of a State, be made on such terms as the Court thinks fit.

Removal by
order of the
High Court.

(2) When any such order for removal is made, the proceedings in the cause and such documents, if any, relating thereto as are filed of record in the Court of the State, or if part only of the cause is removed a certified copy of those proceedings and documents, shall be transmitted to such Registry of the High Court as is directed by the order.

(a) "**Removal of causes.**"—Part VII. of the *Judiciary Act*, as it now stands, is but a comparatively small residue of a large scheme for the removal of causes from State Courts to the High Court, which formed a prominent feature of the Judiciary Bill as it was originally introduced into the House of Representatives. As first designed, it provided for the removal of all causes, with scarcely any limitation. This was strongly objected to, and it was finally decided to restrict the power of removal to causes arising under the Constitution, or in-

volving its interpretation, and, even with respect to those causes, that they should only be removed when pending in a State Court "on appeal."

The power of removal of federal cases from State Courts to the Federal Supreme Court has been largely adopted in the judicial system of the United States. It has been held there that Congress has an unquestionable right to remove all cases, within the scope of the judicial power, from the State Courts to the Courts of the United States at any time before final judgment, though not after final judgment; *per* Story, J., in *Martin v. Hunter's Lessee*, 1 Wheat., 30. This power of removal is not found in express terms in any part of the American Constitution; it is only given by implication as a power necessary and proper to carry into effect some express power. It pre-supposes an exercise of original jurisdiction elsewhere; it is familiar in Courts acting according to the course of Common Law, in criminal as well as in civil cases. In both cases, it is always deemed to be an exercise of appellate and not of original jurisdiction. A writ of error is but a process which removes the record of one Court to the possession of another, which is thereby enabled to inspect the proceedings, and give such judgment as law and justice may warrant.

In the United States the Federal Courts have exclusive jurisdiction in certain classes of cases, and they have, concurrently with State Courts, jurisdiction of all suits of a civil nature at Common Law, or in Equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution and laws of the United States, or in which controversy the United States are plaintiffs or petitioners, or in which there is a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid. In all cases in which the jurisdiction of the Federal Courts is not made exclusive, suits can be instituted in the State Courts. It was contended that if there were not some provision under which a cause brought in a State Court might be removed to a Federal Court, the purpose had in view in conferring the federal power would often be defeated; for example, it was said if a citizen of one State brought a suit in one of its Courts against a citizen of another State, the case would be one which, by the Constitution, is included in the grant of the federal power; and the reason why it was so included is that it may sometimes happen that local sentiment, prejudices, or prepossessions may preclude a fair trial in the State Court, or at least give rise to fears or suspicions that such may be the case. It may be proper to allow the suit to be thus brought in a State Court in the first instance, because in most cases no such influences would be suspected or feared, and the parties would go to trial in the State Court without objection; but if they are feared, the reasons for referring the case to the Federal Court are then apparent; *Cooley's Prin. of Const. Law*, p. 139.

The reasoning which led to the adoption of such elaborate removal provisions in the United States have not been recognized as being applicable to Australia, as it is not admitted that there are such State antagonisms, State jealousies and State prejudices existing in this country as are said to exist in America. The provisions of Part VII., enabling the removal of cases pending in a State Court on appeal, will probably be found to be of little practical use or value except on very rare occasions, where, for special cause shown by a party, or where the Attorney-General of the Commonwealth, or of a State, thinks it necessary to intervene, the

High Court may make such an order. It is limited to suits arising under the Constitution, or involving its interpretation. Such suits can only be removed upon the application of a private individual, being a party, for special cause shown, and then only when they are pending in a State Court on appeal. Such suits, when pending on appeal, may be removed upon the application of the Attorney-General of the Commonwealth, or the Attorney-General of a State, without special cause being shown.

As to complete relief in causes removed into High Court, see *Jud. Act*, sec. 32.

(b) "**Arising under the Constitution.**"—See note to sec. 30 (g), *supra*, p. 125.

41. When a cause or part of a cause is removed into the High Court under the provisions of this Act, the High Court shall proceed therein as if the cause had been originally commenced in that Court and as if the same proceedings had been taken in the cause in the High Court as had been taken therein in the Court of the State prior to its removal, but so that all subsequent proceedings shall be according to the course and practice of the High Court.

Proceedings
after removal.
U.S. A.D. 1875
c. 137 s. 6.

42. (1) If in any cause removed in whole or part from a Court of a State into the High Court it appears to the satisfaction of the High Court at any time after the removal that the cause does not really and substantially arise under the Constitution or involve its interpretation, the High Court shall proceed no further therein but shall dismiss the cause or remit it to the Court from which it was removed as justice requires, and shall make such order as to costs as is just.

Remittal of
cases improperly
brought or
removed.
U.S. A.D. 1875
c. 137 s. 6.

(2) Every such order of remitter shall be carried into execution forthwith, and the proceedings and documents shall be returned to the Court from which they were received.

43. When a cause is removed in whole or part into the High Court the High Court may—

Certiorari.
Ib. s. 7.

- (a) issue a writ directed to the Judges of the Court from which it is removed commanding them to make return of the records in the cause, and may enforce the writ according to law ; or
- (b) allow the party removing the cause to file in the High Court a sworn copy of the records in such

other Court, and may thereupon proceed upon the copy.

Effect of
interlocutory
orders &c. before
removal of cause.
U.S. 1875 c. 137
s. 4.

44. When a cause is removed in whole or part into the High Court from any Court of a State—

- (a) every order relating to the custody or preservation of any property the subject-matter of the cause which has been made before the removal shall remain in force until it is discharged or varied by the High Court; and
- (b) any attachment or sequestration of the goods or estate of a defendant had in the cause in the Court of the State before the removal shall hold the goods or estate so attached or sequestered to answer the final judgment of the High Court in the same manner as by law they would have been held to answer the final judgment of the Court in which the cause was commenced; and
- (c) all undertakings or security given by any party in the cause before the removal shall remain valid and effectual notwithstanding the removal; and
- (d) all injunctions orders and other proceedings granted made or taken in the cause before the removal shall remain in full force and effect until the High Court otherwise orders.

Remitter for
trial.

45. (1) Any matter which is at any time pending in the High Court, whether originally commenced in the High Court or not, may be remitted for trial to any Court of a State which has federal jurisdiction with regard to the subject-matter and the parties.

(2) The order remitting the matter may be made by the High Court, or a Justice sitting in Chambers, on the application of any party to the matter.

Defence in
causes removed
to High Court.

46. When a cause is removed in whole or part from any Court of a State into the High Court, the defendant may set up by way of defence any matter which he might have set up if the cause had been commenced in the High Court, notwithstanding

that the Court from which the cause was removed had not jurisdiction to entertain the matter of defence or could not entertain it in the same cause.

PART VIII.—MEMBERS AND OFFICERS OF THE HIGH COURT.

Salaries of Justices.

47. (1) There shall be paid to the Chief Justice a salary at the rate of Three thousand five hundred pounds a year, and to each other Justice a salary at the rate of Three thousand pounds a year.

(2) There shall also be paid to each Justice of the High Court, on account of his expenses in travelling to discharge the duties of his office, such sums as are considered reasonable by the Governor-General.

48. (1) The salaries (a) of the Justices of the High Court shall be charged on and paid out of the Consolidated Revenue Fund. Payment of salaries.

(2) They shall grow due from day to day, but shall be payable monthly.

(a) "**Salaries of Justices.**"—See sec. 47, *supra*.

Barristers and Solicitors (a).

49. (1) Any person entitled to practise as a barrister or solicitor or both in any State shall have the like right to practise in any federal Court. Barristers and solicitors.

(2) Provided that before so doing he shall produce to the Principal Registrar evidence showing that he is so entitled and in what capacity, and the Principal Registrar shall thereupon enter his name in a Register of Practitioners to be kept at the Principal Registry.

(3) A copy of the Register shall be kept at every District Registry.

(4) The High Court may direct the name of any person to be struck off the Register upon proof that he has been guilty of conduct which renders him unfit to be allowed to continue to practise as a barrister or solicitor, or that he has been deprived

by the Supreme Court of the State, by virtue of his right to practise wherein he was registered, of the right to practise in that State as a barrister or solicitor.

(a) **"Barristers and Solicitors."**—As in the judicial system of the United States, there is no general or national organization of the legal profession in the Commonwealth. Each State has its own bar, and its own laws regulating admission to practice; any person entitled to practice as a barrister or solicitor, or both as a barrister and solicitor, in any State, can readily gain admission to practice in the same capacity in the High Court, or in any Federal Court which may hereafter be created by Parliament. Parliament could have authorized the Justices of the High Court to frame regulations providing a federal standard of qualification for admission to practice in Federal Courts, but it has not done so. It has recognized the legal standard and professional status as established by law in each State. The federal law recognizes no distinction between barristers and solicitors. Every lawyer who, by the law of his own State, is entitled to practice in both branches of his profession, is entitled to a similar privilege in the realm of federal law and litigation; a lawyer, however, who has been admitted to practice in a State in which he can perform the duties and exercise the functions and rights of a barrister only, or a solicitor only, can only exercise similar functions and enjoy similar rights in federal practice.

Referring to the legal profession in the Federal Courts of America, Mr. Bryce says that there, as in some parts of Europe and in most British colonies, there is no distinction between barristers and attorneys. Every lawyer or counsel is permitted to take every kind of business—from arguing a cause in the Supreme Court at Washington, to writing letters in small debt cases. He may himself conduct all the proceedings in a cause, confer with a client, issue the writ, draw the declaration, get together the evidence, prepare the brief, and conduct the case when it comes on in Court. In spite, however, of this union of all a lawyer's functions in the same person, considerations of practical convenience have, in many places, established a division of labour similar to that existing in England. Thus where two or more lawyers are in partnership, it often happens that one member undertakes the Court work, while another sees the clients, conducts correspondence, and prepares cases for trial. Apart from the arrangement which distributes the various kinds of business among the members of a firm, there is a certain tendency for work of a special character to fall into the hands of special men. As a practitioner rises, it is easier for him to select his business, and when he has attained real eminence, he may confine himself entirely to the higher walks, giving opinions and arguing cases. With the important difference that he is liable for any negligence, such a counsel, says Mr. Bryce, occupies substantially the same position as an English Queen's Counsel, and his services are sought not only by clients directly, but by other practitioners or firms, who may have important suits in hand for which they may feel themselves unequal; *Bryce's Amer. Com.*, 1st ed., vol. 2, p. 498.

During the progress of the Judiciary Bill through the House of Representatives, a proposal was submitted to extend sec. 49 so as to entitle a person to practice as a barrister or solicitor, or both as a barrister and solicitor in any

Court "exercising federal jurisdiction" throughout the Commonwealth. This was objected to, one of the grounds being that there was some doubt as to the constitutional authority of Parliament to authorize a legal practitioner, admitted on one State, to practice in the Courts of another State, whilst such Courts are engaged in the exercise of federal jurisdiction. The amendment was defeated, and the constitutional point remains unsettled.

On the question of precedence between Queen's Counsel appointed by the Governor-General of Canada and those appointed by the Lieutenant-Governors of Provinces, see the case of *Lenoir v. Ritchie*, 3 Sup. Court Reports (Canada), 575. In this case it was decided that the Lieutenant-Governors of Provinces could appoint Queen's Counsel, but that it was *ultra vires* to give them precedence over Queen's Counsel previously appointed by the Governor-General of Canada.

As to right of barristers and solicitors to appear in Courts exercising federal jurisdiction, see *Jud. Act*, sec. 78.

50. The Crown Solicitor for the Commonwealth shall, in respect of his office, be entitled to practise as a solicitor in any federal Court or Court exercising federal jurisdiction, and be entitled to all the rights and privileges of a solicitor in each State, whether he is or is not enrolled as a solicitor in any State.

Crown Solicitor entitled to rights and privileges of a solicitor in every State.
Cf. U.K., 37 & 38 Vict., c. 68, s. 12.

Registrars.

51. (1) At the Principal Registry of the High Court there shall be an officer to be called the Principal Registrar (a) and such other officers as are necessary.

(2) There shall also be at every District Registry a District Registrar and such other officers as are necessary.

(3) Provided that after the first day of July One thousand nine hundred and four no new office shall be created either in the Principal Registry or in any District Registry unless the Chief Justice certifies (b) in writing to the Governor-General that the new office is necessary.

(a) **Principal Registrar.**—As to duty of, to issue writs, see *High Court Procedure Act*, sec. 6; as to duty with respect to transfer of causes see *ib.*, sec. 7, *et seq.*; as to his duty to seal writs, see Or. 49, r. 3; to supply copy of records, *ib.*, r. 4.

(b) **"Chief Justice certifies."**—The office of Taxing Officer in the Supreme Court office was created, and a gentleman appointed to fill such office, by the Executive Council, without the certificate in writing of the Judges to the Governor that such officer was necessary, having been given. The Taxing Officer was appointed to relieve the Registrar of the Court from the duty of taxing bills

of costs. Upon his appointment having been brought to the knowledge of the Court, it was held that the office was a new office under the *Supreme Court Act of 1867*, sec. 39; that the appointment having been made without the certificate of the Judges, as required by the same section of that Act, it was an irregular and illegal appointment, and his acts as such officer were void; *Byrnes v. James*, 3 Q.L.J., 165.

Power of
Registrars.
Jud. Act 1873
s. 62.

52. The Principal Registrar and the several District Registrars shall have power to administer oaths and perform such duties in respect of any proceedings pending in the High Court as are assigned to them by Rules of Court or by any special order of the Court.

The Marshal.

Marshal.

Qd. Sup. Ct. Act.

53. There shall be an officer to be called the Marshal (a), who shall be charged with the service and execution of all writs, summonses, orders, warrants, precepts, process, and commands of the High Court which are directed to him, and shall make such return of the same to the Court together with the manner of the execution thereof as he is thereby required, and who shall take receive and detain all persons who are committed to his custody by the Court, and shall discharge all such persons when thereunto directed by the Court or by law.

(a) "**The Marshal.**"—In the case of persons who may be liable to attachment at the same time in a Federal Court and in the Court of a State, as well as in the case of property liable to be seized in execution by the marshal in a suit in a Federal Court and by a sheriff in a suit in a State Court, the rule is that that jurisdiction which first actually attaches, either to the person or the property, will retain control, and cannot be divested by process issued from the other jurisdiction; *Smith v. McIver*, 9 Wheat., 532. For other authorities see *Patterson's Federal Restraints on State Action*, p. 233.

"The forbearance which Courts of co-ordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with, perhaps, no higher sanction than the utility which comes from concord; but between State Courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These Courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process and the decision of questions relating

to it, are part of the jurisdiction of the Court from which it issues"; *per* Matthews, J., in *Covell v. Heyman*, 111 U.S., 182.

"We hold it to be an incontrovertible principle that the Government of the United States may, by means of physical force exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent." . . . "Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the Courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the district of Columbia, or perhaps to some foreign soil"; *per* Bradley, J., in *Ex parte Siebold*, 100 U.S., p. 371.

In *Buck v. Coldbath*, 3 Wall., p. 334 (on Error in the Supreme Court of the U.S.), the facts were, that Coldbath sued Buck in a State Court to recover damages for trespass in taking his goods. The defendant simply pleaded that he was marshal of the United States, and that he had seized the goods under an attachment against the property of certain parties named therein; he did not aver that the goods belonged to the defendant named in the writ. The Court held that the marshal was guilty of trespass in levying upon the property of one against whom the writ did not run; that he could be sued for damages in a State Court, and that the mere fact that the writ issued from a Federal Court constituted no defence. In *Bock v. Perkins*, 139 U.S., p. 628, Mr. Justice Hyland said that marshals and their deputies have in their respective States the same powers in executing the laws of the United States as sheriffs and their deputies have in executing the laws of such States.

As to proceedings in actions by and against the marshal, see *High Court Procedure Act*, sec. 31; as to interpleader proceedings see *ib.*, sec. 27; see also Or. 44 prescribing the duties of the marshal and other officers charged with service and execution of process.

54. There shall also be in and for each State in which Deputy Marshal. there is a District Registry a Deputy or Deputies of the Marshal, each of whom shall, when required by the High Court by any writ process or other proceeding to him directed, execute and perform within the State all such acts as the Marshal would be bound to perform if he were personally present and acting in the State.

55. The Governor-General may appoint such officers as he Marshal's officers. Qd. law. thinks fit to assist the Marshal and his Deputies in the execution of their duties, and all acts done by those officers shall be deemed to be done by and under the authority of the Marshal.

PART IX.—SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES (a).

Suits against the Commonwealth.

56. Any person making any claim against the Commonwealth, whether in contract (b) or in tort (c), may in respect of the claim bring a suit against the Commonwealth in the High Court (d) or in the Supreme Court of the State in which the claim arose.

(a) "Suits by and against the Commonwealth and the States."—The Constitution, sec. 75, sub-secs. (iii.) and (iv.), gives the High Court jurisdiction in all matters in which the Commonwealth is a party, between States, and between a State and a resident of a different State. This gives jurisdiction only; it does not give a litigant a right to bring a suit against either the Commonwealth or a State; to enable him to do so additional legislation under sec. 78 was necessary.

The provisions of Part IX. respecting suits by and against the Commonwealth and the States have been made in pursuance of power conferred by the Constitution, sec. 78. By that section the Parliament is authorized to confer rights to proceed against the Commonwealth or against a State in respect of matters within the limits of the judicial power. Parliament has conceded full right of action against the Commonwealth, as well as against the States, both in matters of contract and tort; the suit must, however, be in respect of a matter within the limits of the judicial power.

(b) "Contract."—It is an ancient and fundamental maxim of the Constitution that the King can do no wrong, that the Crown is not personally responsible, by any of the ordinary legal methods, for any act done by itself or by its subordinates; *Tobin v. The Queen*, (1864) 33 L.J.C.P., 199. This led to the rule that no action or suit could be brought against the Crown, excepting cases where the King had of his own free will graciously ordered right to be done. The Petition of Right originated in the reign of Edward I.; it was substituted for a *præcipe* against the King; it is founded on the theory that the King has ordered right to be done. It is a precedent open to a subject in cases where his land, goods, or money have found their way into the possession of the Crown; the petition seeks restitution thereof, or, alternately, compensation in money; *Feather v. The Queen* 33 L.J.Q.B., 200. By this process the subject can, on grounds similar to those which would entitle the suppliant to judgment against a fellow subject, recover money due to him under a contract made on behalf of the Crown, such as for goods supplied, or for services rendered, or for unliquidated damages for breach of contract; *Thomas v. The Queen*, L.R., 10 Q.B., 31; *Windsor and Annapolis Ry. Co. v. The Queen*, 11 App. Cas., 607.

Officers of the Crown are not personally liable for contracts entered into by them on behalf of the Crown; *Palmer v. Hutchinson*, (1886) 6 App. Cas., 619; *Peck v. Marshfield*, (1897) 1 Q.B., 333. But if a Minister commits a trespass in regard to the personal property of another he may be sued as a private person; *Black v. Glendon*, (1898) 1 Ch., 73.

(c) "Torts." A "tort" is an actionable wrong involving a breach of duty arising independently of a contract. A breach of contract, wilful or otherwise, is a breach of the duties which the parties have fixed for themselves. Duties

broken by the commission of civil wrongs are those fixed by law independently of the will of the parties; *Pollock on Torts*, 6th ed., p. 5. Among the civil wrongs for which remedies are provided by the common law of England, or by statute law creating new rights of action, are (1) personal wrongs affecting a man's personal safety and freedom, such as assault, battery, or false imprisonment; (2) wrongs affecting property, such as trespass, conversion and interference with rights analogous to those of property; and (3) other wrongs to the person and property, such as negligence and nuisance.

It has long been held that no action for tort will lie against the Crown, because the King can do no wrong; *Canterbury v. Regina* (1842), 4 St. Tr. (N.S.), p. 767. The maxims *Qui facit per alium facit per se* and *Respondeat superior* have no force or application when a servant of the Crown commits a tort. What the Sovereign does personally the law presumes will not be wrong; what he does by the hands of his servants cannot be wrong in him, for if the command be unlawful, it is no command, and the servant alone is responsible for the unlawful act, the same as if there were no command; *Musgrove v. Pulido*, 5 App. Ca., 109; *Tobin v. The Queen*, *supra*.

In some British possessions provision has been made allowing actions to be brought against the Government in respect of tortious acts done under the authority, or colour of authority, of colonial legislation; *Attorney-General of States Settlement v. Wemyss*, 13 App. Ca., 192; *Farnell v. Bowman*, 12 App. Ca., 643.

Although the *Claims against the Government Act* of New South Wales makes the Government liable for actions of tort, it does not operate to put the Government, with regard to its important executive functions, in the same position as a private individual. On grounds of public policy the Government must possess a large degree of immunity from liability in the exercise of those functions, and the Court must in each case determine on the general law and on the construction of the statutes affecting the question, how far the Government is liable for any particular tort complained of; *Davidson v. Walker* (1901), 1 S.R. (N.S.W.), 196.

In the case of *The Queen v. Williams*, L.R. 9 App. Ca., H.L. 418, it was held that there was a duty imposed by law upon the Executive Government to take reasonable care that vessels using the staiths in the ordinary manner might do so without damage to the vessel. Reasonable care is not shown when, after notice of danger at a particular spot, no inquiry is made as to its existence and extent, and no warning is given.

A person seeking to recover Customs duties improperly levied cannot sue the Crown under the *Victorian Crown Remedies Act 1865*; his remedy is against the Collector of Customs under the *Customs Act*; *Sargood v. The Queen*, 4 V.L.R. (L.), 389.

(d) **"In the High Court or in the Supreme Court."**—A private individual can sue the Commonwealth either in the High Court or in the Supreme Court of a State in which the claim arose; but by sec. 38 a State can sue the Commonwealth in the High Court only; and the Commonwealth itself can institute a suit in the High Court only.

Suits by a State
against the
Commonwealth.

57. Any State making any claim against the Commonwealth (a), whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth in the High Court.

(a) "**State . . . against . . . Commonwealth.**"—Matters "within the judicial power" means matters in which by reason of the subject-matter or the parties, the High Court has, or can be given, original jurisdiction—i.e., the matters mentioned in secs. 75 and 76 of the Constitution. All suits against the Commonwealth, and all suits between the States, whatever the subject-matter, are by sec. 75 within the judicial power of the Commonwealth; consequently no limiting words were necessary in secs. 57, 59, and 60 of the *Judiciary Act*. Moreover suits by a State against the Commonwealth or by a State against a State, are by sec. 38 of the *Judiciary Act* within the exclusive jurisdiction of the High Court; consequently in secs. 57 and 59 the High Court alone is mentioned.

Suits against a
State in matters
of federal
jurisdiction.

58. Any person making any claim against a State (a), whether in contract or in tort, in respect of a matter in which the High Court has original jurisdiction or can have original jurisdiction conferred on it, may in respect of the claim bring a suit against the State in the Supreme Court of the State, or (if the High Court has original jurisdiction in the matter) in the High Court.

(a) "**Person . . . against . . . a State.**"—A suit by a person against a State is not necessarily within the judicial power; it is not within the judicial power unless—(1) the plaintiff is a resident of another State, or (2) the subject-matter of the suit comes within sec. 75 or 76 of the Constitution. Consequently sec. 5 of the Act is not intended to apply to all suits by a person against a State, but is limited to suits "in which the High Court has original jurisdiction or can have original jurisdiction conferred on it"—i.e., cases within secs. 75 and 76 of the Constitution. Moreover the High Court has not been given original jurisdiction in all suits by a person against a State, so that mention of the High Court in sec. 50 is preceded by the words "if the High Court has original jurisdiction in the matter."

Parliament could not create new causes of action unauthorized by the Constitution. Thus it is conceived that a riparian owner of land on the lower Murray in South Australia could not, under this section, sue the State of New South Wales to recover damages for water abstracted to his prejudice by the Government of New South Wales as a riparian owner on the upper river, unless it was shown that he has suffered damage through the violation of some legal right recognized or established by the Constitution. The same principles will in general govern the right to proceed to law in matters between State and States; *Moore's Common. of Aus.*, p. 268.

Suits between
States

59. Any State making any claim against another State (a) may in respect of the claim bring a suit against that State in the High Court.

(a) "**State . . . against . . . State.**"—In the United States this jurisdiction of the Supreme Court has been chiefly employed in cases of disputed boundaries; *Wisconsin v. Pelican Insurance Co.*, 127 U.S., 265. This jurisdiction is not defeated because of the fact that in deciding the question the Court must examine and construe compacts between States, or because the decision affects the territorial limits of the political jurisdiction and sovereignty of States; *Virginia v. West Virginia*, 11 Wall., 39; *Rhode Island v. Massachusetts*, 12 Pet., 657; *Baker's Annot. Const.*, p. 138.

60. In a suit against a State brought in the High Court, the High Court may grant an injunction (a) against the State and against all officers of the State and persons acting under the authority of the State, and may enforce the injunction against all such officers and persons. Injunction against a State and its officers.

(a) "**Injunctions.**"—An injunction was refused to prevent a Minister of Works from violating an agreement between the plaintiffs and him as agent of the Crown; *Newcastle Wallsend Coal Co. v. Arnold*, 2 S.C.R. (N.S.W.), 26. The right to restrain Ministers of the Crown by injunction was discussed in *Sharp v. Board of Land and Works*, 5 A.L.R. (C.N.), 81.

61. Suits on behalf of the Commonwealth may be brought in the name of the Commonwealth by the Attorney-General or by any person appointed by him in that behalf. Suits by Commonwealth.

62. Suits on behalf of a State may be brought in the name of the State by the Attorney-General of the State, or by any person appointed by him in that behalf. Suits by a State.

63. Where the Commonwealth or a State is a party to a suit, all process in the suit required to be served upon that party shall be served upon the Attorney-General of the Commonwealth or of the State, as the case may be, or upon some person appointed by him to receive service. Service of process when Commonwealth or State is party

64. In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject. Rights of parties.

65. No execution or attachment, or process in the nature thereof, shall be issued against the property or revenues of the Commonwealth or a State in any such suit; but when any judgment is given against the Commonwealth or a State, the Registrar shall give to the party in whose favour the judgment is given a certificate in the form of the Schedule to this Act, or to a like effect. No execution against Commonwealth or a State.
(Tas.) 55 Vict. No. 24, s. 10. Schedule.

Performance by
Commonwealth
or State.

(Tas.) 65 Vict.
No. 24, s. 11.

66. On receipt of the certificate of a judgment against the Commonwealth or a State the Treasurer of the Commonwealth or of the State as the case may be shall satisfy the judgment out of moneys legally available (a).

(a) "**Moneys legally available.**"—By the *Commonwealth Audit Act*, sec. 32, the Auditor-General is required, before counter-signing any instrument for the payment of public money, to ascertain that the sums therein mentioned are legally available for and applicable for the services or purposes mentioned in such instrument. Under the *Victorian Crown Remedies and Liabilities Act 1865*, it was provided that upon receipt of a certificate of a judgment against the Crown "it shall be lawful for the Governor to cause to be paid out of the consolidated revenue such damages and costs as may be awarded to the petitioner." In the case of *Alcock v. Fergie*, 4 W.W. & A.B. (L.), 285, it was held that the Act did not amount to a special appropriation; that judgments against the Crown could not be legally satisfied until the will of Parliament on the question had been expressed; that no expression of that will had been conveyed by the *Crown Remedies and Liabilities Act*; that when the said Act was passed the Legislature must have had the *Audit Act* in their recollection, by which the Audit Commissioner was ordered to certify that public money is available before it is paid; that Parliament did not expressly or impliedly repeal the *Audit Act*, and that as the *Crown Remedies and Liabilities Act* did not contain a special appropriation for moneys for the satisfaction of judgments against the Crown the Court could not construe it as if Parliament had so made it.

Execution by
Commonwealth
or State.

Ib. s. 12.

67. When in any such suit a judgment is given in favour of the Commonwealth or of a State and against any person, the Commonwealth or the State, as the case may be, may enforce the judgment against that person by process of extent (a), or by such execution, attachment, or other process as could be had in a suit between subject and subject (b).

(a) "**Extent.**"—This is a writ of execution available in cases in which the Crown has an interest. The extent may either be an extent *in chief* or an extent *in aid*, the distinction being that the former is a hostile proceeding by the Crown against its debtor, or against the debtor of that debtor, whilst the latter is an extent issued at the instance of the Crown debtor himself against his debtor to aid his payment of the Crown debt. The extent of the Crown has priority over all executions of the subject. See *Encyc. of Laws of Eng.*, vol. 5, p. 254.

(b) "**Subject and subject.**"—See H.C.P. Act, secs. 26 to 28.

PART X.—CRIMINAL JURISDICTION.

Application of Laws.

State laws to
apply as to pre-
liminary pro-
ceedings in
criminal cases.

68. (1) The laws of each State respecting the arrest and custody of offenders or persons charged with offences, and the procedure for—

- (a) their summary conviction (a); and
- (b) their examination and commitment for trial (b) on indictment (c); and
- (c) their trial and conviction on indictment;

and for holding accused persons to bail, shall apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth committed within that State, or whose trial for offences committed elsewhere may lawfully be held therein.

(2) The several Courts of a State exercising jurisdiction with respect to—

- (a) the summary conviction; or
- (b) the examination and commitment for trial on indictment; or
- (c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State shall have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth committed within the State (d), or who may lawfully be tried within the State for offences committed elsewhere:

(3) Provided that such jurisdiction shall not be judicially exercised with respect to the summary conviction or examination and commitment for trial of any person except by a Stipendiary or Police or Special Magistrate, or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction.

(a) "**Summary Conviction.**"—This means a conviction by any justice or magistrate of a State sitting as a Court authorized by the law of a State to make summary orders or to direct summary punishment, by fine or imprisonment, for offences under State law; *Acts Interpretation Act 1901, sec. 26 (d)*. Procedure in summary jurisdiction includes complaints, informations, warrants, hearing evidence, determination, drawing of orders, and convictions.

(b) "**Commitment for trial.**"—Used in relation to any person this expression means committed to prison with the view of being tried before a Judge and jury, or admitted to bail upon a recognizance to appear and be so tried; *Acts Interpretation Act, sec. 27 (d)*.

(c) "**Indictment.**"—In England an indictment in the strict sense is a written accusation of one or more persons of a crime and presented on oath by a

jury of twelve or more men termed a grand jury; *Chitty's Crim. Law*, I., 167. According to the general usage in Australia an indictment includes an information filed by the Attorney-General or other proper officer for the prosecution of an indictable offence. It is within the power of Parliament to decide what shall be an indictable offence and what shall not be.—*Quick and Garran's Annot. Const.*, p. 808. Indictment includes information; *Acts Interpretation Act*, sec. 27 (a).

(d) “**Within the State.**”—Every trial on indictment for any offence against a law of the Commonwealth must be held in the State where the offence was committed. If the offence was not committed within any State the trial must be held at such place as Parliament prescribes; *Const.*, sec. 80.

Indictable Offences.

Indictments.

69. (1) Indictable offences against the laws of the Commonwealth shall be prosecuted by indictment in the name of the Attorney-General of the Commonwealth or of such other person as the Governor-General appoints in that behalf.

(2) Any such appointment shall be by commission in the King's name, and may extend to the whole Commonwealth or to any State or part of the Commonwealth.

(3) Any person committed for trial for an indictable offence against the laws of the Commonwealth may at any time within fourteen days after committal and before the jury is sworn apply to a Justice in Chambers or to a Judge of the Supreme Court of a State for the appointment of counsel for his defence. If it be found to the satisfaction of the Justice or Judge that such person is without adequate means to provide defence for himself, and that it is desirable in the interests of justice that such an appointment should be made, the Justice or Judge shall certify this to the Attorney-General, who may if he thinks fit thereupon cause arrangements to be made for the defence of the accused person. Upon committal the person committed shall be supplied with a copy of this sub-section.

Offences committed in several States.
U.S. 731.

70. When an offence against the laws of the Commonwealth is begun in one State (a) or part of the Commonwealth and completed in another, the offender may be dealt with tried and punished in either State or part in the same manner as if the offence had been actually and wholly committed therein.

(a) “**Begun in one State.**”—Under sec. 731 U.S. Revised Statutes, the following decisions have been given:—The section does not apply to a libel written in one district and published in another; *Ex parte Buell*, 3 Dill., 116; *Fed. Cas.*,

No. 2102; that it shall be deemed to have been committed in either; *Ball v. United States*, 140 U.S., 118.

71. When any person is under commitment upon a charge of an indictable offence against the laws of the Commonwealth, the Attorney-General or such other person as the Governor-General appoints in that behalf may decline to proceed further in the prosecution, and may, if the person is in custody, by warrant under his hand direct the discharge of the person from custody, and he shall be discharged accordingly.

Discharge of persons committed for trial.

Appeal.

72. (1) When any person is indicted for any indictable offence against the laws of the Commonwealth, the Court (a) before which he is tried shall on the application by or on behalf of the accused person made before verdict, and may in its discretion either before or after judgment without such application, reserve any question of law (b) which arises on the trial (c) for the consideration of a Full Court of the High Court or of a Full Court of the Supreme Court of the State.

Reservation of points of law. Qd. Cr. Code s. 608.

(2) If the accused person is convicted (d), and a question of law has been so reserved before judgment, the Court before which he was tried may either pronounce judgment on the conviction and respite execution of the judgment, or postpone the judgment until the question has been considered and decided, and may either commit the person convicted to prison or admit him to bail on recognisance with or without sureties, and in such sum as the Court thinks fit, conditioned to appear at such time and place as the Court directs and to render himself in execution or to receive judgment as the case may be.

(3) The presiding Judge is thereupon required to state in a case signed (e) by him the question of law so reserved with the special circumstances upon which it arose, and if it be reserved for the High Court the case shall be transmitted to the Principal Registry.

(a) "**Court.**"—After the conviction of a prisoner sentence was deferred pending an appeal to the Full Court, and certain points were reserved. After the rising of the Court and during vacation, the prisoner's attorney submitted certain other points to the Judge in his Chambers, and they were included in the special

case; it was held that such points were not properly submitted under secs. 422, 423 of 46 Vict., No. 17 (N.S.W.). *Per* Stephens, J.: "In the absence of any agreement by which the Crown considers itself bound, I am of opinion that the objection must prevail. It cannot be that the word 'Court' in sec. 422 is intended to mean the Judge sitting in his Chambers in vacation"; *R. v. Dean*, 17 N.S.W.L.R., p. 142. But see also *R. v. Whelan*, 5 W.W. & A'B (L.), 7; *R. v. Wisher*, 7 Q.L.J., 53.

BEFORE JUDGMENT.—In the case of a prisoner committed for sentence and pleading guilty, the Judge has power to reserve for the consideration of the Court a question of law arising on the depositions. A plea of guilty was under the circumstances ordered to be struck out and a plea of not guilty to be entered; *R. v. Moody*, 8 Q.L.J., 102. Where a prisoner pleaded guilty and it was doubtful whether a document which was alleged to be a forgery was really a forgery, of his own motion Darley, C.J., reserved the point for the opinion of the Court; *R. v. Wilton*, 6 W.N. (N.S.W.), 6.

(b) "**Question of law.**"—Where the question is merely one as to a rule of practice and not a question of law, it cannot be reserved. It is a rule of practice not to permit the examination of witnesses, the knowledge of whose evidence has been withheld from the prisoner until the trial. It appears that such examination may be allowed where a very strong excuse, to the satisfaction of the presiding Judge, is put forward by the prosecution. It was held by the Victorian Court that the propriety of the admission of such evidence is not a question of law; *R. v. Brown*, 6 W.W. & A'B. (L.), 239. A matter of discretion should not as a general rule be reserved, except where it is doubtful whether it is a question of discretion or a question of law; *R. v. Hall*, 16 V.L.R., at p. 654. A decision on a question of law raised on a demurrer to an information may be appealed against on a case stated; *R. v. Dean*, 17 N.S.W.L.R. (L.), 132. An appeal was held not to lie on a case stated on a question raised as to the proper constitution of the tribunal; *R. v. Short*, 19 N.S.W.L.R., 385. The validity of a conviction when the prisoner had been absent during a part of trial was raised on a case stated; *R. v. Abrahams*, 21 V.L.R., 343. A question of procedure cannot be reserved; *R. v. Lee*, 6 V.L.R. (L.), 225. An appeal lies by case stated on an arrest of judgment at the trial; *Jud. Act*, sec. 76.

As to the improper admission of evidence, see *Jud. Act*, sec. 75.

See further as to questions of law which may be reserved under the English Statute, *Crown Cases Reserved Act* 1848 (11 & 12 Vict., c. 78); *Archbold's Criminal Pleading*, 22nd ed., 249.

(c) "**On the trial.**"—The question must arise on the trial; *R. v. Thompson*, 4 W.W. & A'B. (L.), 23; but a liberal construction will be given to the statute; *R. v. Whelan*, 5 W.W. & A'B. (L.), 7; *Reg. v. Mount and Morris*, 4 A.J.R., 38. Compare *R. v. Dean*, 17 N.S.W.L.R., 132. Where counsel for prisoner contended to the jury at the trial that as to one of the prisoners there was not sufficient evidence to justify a conviction, but did not submit to the presiding Judge there was no evidence to go to the jury, and some days after the trial the point whether there was any evidence of the said prisoner's guilt was reserved at the request of counsel, it was held that no question of law had arisen at the trial; *R. v. Crawshaw*, 1 S.C.R. (N.S.), N.S.W., 257. A judge has power to

state a special case on a point arising on a trial, although no formal reservation of the point has been made at the trial; *R. v. Wisner*, 7 Q.L.J., 52. Compare *R. v. Whelan*, 5 W.W. & A'B. (L.), 7. Counsel may at any time during a criminal trial withdraw a request for the reservation of a point which they have at an earlier stage of the trial asked to have reserved; *R. v. Cawley*, 7 Q.L.J., 45.

(d) "**Convicted.**"—A case reserved would lapse in case of acquittal; *R. v. Benjamin*, 5 W.W. & A'B. (L.), 178. A special case cannot be entertained by the Court until there be a conviction; *R. v. Prendergast*, 4 A.J.R., 154; *R. v. Finn*, 1 S.C.R. (N.S.) N.S.W., 259; *R. v. Wright, Heaton & Co.*, 4 W.N. (N.S.W.), 65.

(e) "**Signed.**"—Where a special case reserved by the Judge at a criminal trial was in the handwriting of the learned Judge, but not signed by him as required by *The Criminal Law and Practice Statute 1864* (No. 233), sec. 390, and he had died before it came on to be heard, the Court considered the case sufficiently stated and entertained it; *R. v. Duffy*, 6 V.L.R. (L.), 430.

"**IS REQUIRED TO STATE CASE.**"—A mandamus was issued by the Supreme Court to an inferior Court to state a case; see *Ex parte O'Neill*, 1 W.N. (N.S.W.), 100. But under *The Criminal Law Amendment Act* (46 Vict., No. 17), s. 422, (N.S.W.), no duty to state a case is imposed except where a verdict has been returned; *Ex parte Burns*, 10 W.N. (N.S.W.), 70. Under the *Crimes Act 1890* (54 Vict., No. 1079), sec. 485, of Victoria it is enacted that when a Judge refuses to reserve a question of law in criminal cases, the Court may order one to be stated; see *R. v. Ludlow*, 24 V.L.R., 93, in which case a rule *nisi* was granted, but discharged. As to practice under this section, see *R. v. Attorney-General*, 12 V.L.R., 73. In *R. v. Griffin* (No. 2), 1 S.C.R. (Q.), 182, it was questioned whether a mandamus would lie to a Judge of assize.

73. Any question so reserved (a) shall be heard and determined (b) after argument (c) by and on behalf of the Crown and the convicted person or persons if they desire that the question shall be argued, and the Court may—

Hearing.
Qd. Cr. Code,
s. 669.

- (a) affirm the judgment given at the trial; or
- (b) set aside (d) the verdict and judgment and order a verdict of not guilty or other appropriate verdict to be entered; or
- (c) arrest the judgment; or
- (d) amend the judgment; or
- (e) order a new trial (e); or
- (f) make such other order as justice requires;

or the Court may send the case back (f) to be amended or restated.

(a) "**Any question so reserved.**"—The actual point of law raised must be stated in the special case; *R. v. Pugliese*, 2 W.N. (N.S.W.), 88. Where the special case did not state the sentence imposed the Court held that it could not take judicial notice of the sentence which, *semble*, was illegal; *R. v. Price*, 6 N.S.W.L.R., 139. Under similar circumstances, however, the Court allowed the

question of legality of sentence to be argued ; *R. v. Harrison*, 8 N.S.W.L.R., 57. A point not taken in the Court below cannot be raised before the Full Court where the record is not before the Court ; *R. v. Dean*, 17 N.S.W.L.R., 35. The Court will not entertain such a point unless it appears on the record, and some point has been taken which has the effect of bringing the record before the Court. Where there is a general ground taken, such as that there is no evidence to support the indictment, the Court will entertain a point which falls within that general ground, although it was not taken below ; *R. v. Powell*, 13 W.N. (N.S.W.), 44. If a point be not taken in the Court below, but appears in the case stated, it can be entertained by the Full Court ; *R. v. Culgan*, 19 N.S.W.L.R., 166 ; *R. v. O'Keefe*, 14 N.S.W.L.R., 548. It would appear that where, on the facts stated in the case, there has been a manifest miscarriage of justice, the Full Court should intervene and repair the injustice, although the judge stating the case has failed to direct attention to the point ; *R. v. Cawley*, 7 Q.L.J., 45. The Court in New South Wales held that in cases reserved under 13 Vict., No. 8, the Supreme Court had power to entertain a point arising on an information, if it went to the root of the information, even though it had not been mentioned in the special case ; *per Martin, C.J.*, *R. v. Wilson*, 12 S.C.R. (N.S.W.), 258.

The Court cannot receive affidavits on the argument of a case reserved, but will only read the special case ; *R. v. Collett*, 14 S.C.R. (N.S.W.), 291. Counsel are not allowed to refer to matters outside the case as stated ; *R. v. Wells*, 5 S.C.R. (Q.), 181.

(b) "**Shall be heard and determined.**"—It was held under State law that when a case was once reserved it must be argued, as the Court had to give an answer to the question raised ; *R. v. Whitehead*, 3 A.L.R. (C.N.), 71 ; and that the Judge after sentence could not act on the subsequent intimation of counsel that he did not wish to have the case stated ; *R. v. Matthews*, 12 N.S.W.L.R., 64. The point was raised in *R. v. Taylor*, 6 W.N. (N.S.W.), 146. Under this section counsel may intimate that he does not desire the question to be argued.

(c) "**Argument.**"—In New South Wales on the argument before the Supreme Court of a case reserved only one counsel on each side will as a rule be heard ; *R. v. Packer*, 3 S.C.R., 40 ; *R. v. Griffin*, 10 S.C.R., 91. In *R. v. Wells*, 5 S.C.R. (Q.), 182, *per Lilley, J.* :—"In matters of error only one is usually heard on each side. The Court will hear the whole number if they wish." Counsel for the Crown is entitled to be heard though there is no appearance for the prisoner ; *R. v. Taylor*, 2 W. & W. (L.), 153. The party at whose instance the case has been reserved has the right to begin ; *R. v. Roberts*, 12 V.L.R., 135. The prisoner should in all cases have notice when his case will be argued ; *R. v. Rose*, 8 N.S.W.L.R., 31. See also *Archbold's Criminal Pleadings*, 22nd ed., 249.

(d) "**Set aside the judgment.**"—It was held in Queensland that where a conviction is reversed the proper order is—vacate the judgment, discharge the prisoner if in custody, otherwise the bail to be released ; *R. v. Duncan*, 4 Q.L.J., 219. As to the effect of a reversal of a judgment see *R. v. O'Keefe*, 15 N.S.W.L.R. (L.), 1. In certain cases a conviction will not be set aside on the ground of improper admission of evidence ; *Jud. Act*, sec. 75.

(e) "**New trial.**"—In Victoria it was held that the Supreme Court could not, on a case stated by General Sessions, order a fresh trial to be had before itself ;

R. v. Herbert, 8 V.L.R., 205. A new trial was ordered where there had been a misdirection of the jury by the Judge on the trial of prisoners for stealing and receiving goods; *Reg. v. Murphy*, 4 W.W. & A'B. (L.), 218. A new trial was ordered in *R. v. Whelan*, 5 W.W. & A'B. (L.), 7. Where a Crown prosecutor replied in a case where no right of reply existed, the conviction was quashed. Counsel for the Crown contended that the Court should order a new trial. *Per* Griffith, C.J., in *R. v. Walsh* (1902), S.R., 6 :—"That sub-section (Criminal Code 669 (e)) does not give the power. It is merely a re-statement of the former law, and any cases in which it has been held that the Court has power to grant a new trial have been over-ruled by *Attorney-General of N.S.W. v. Bertrand* (1867), L.R. 1 P.C., 520, and *Attorney-General of N.S.W. v. Murphy* (1869), 11 Cox C.C., 372." The prisoners in this case were charged with stealing in a dwelling-house.

(f) "**Send the case back.**"—Where it was to be presumed that the preliminary evidence necessary to make a deposition admissible in evidence was duly given the Court refused to send the case back to the Judge to be re-stated; *R. v. Korner*, 9 S.C.R. (N.S.W.), 344. Where a Judge has refused to state a point raised by counsel in a case reserved by him on other points, the proper time to bring the matter before the Full Court is on the hearing of the Crown case reserved; *R. v. Griffin* (No. 2), 1 S.C.R. (Q.), 182. Where a case appears on the face of it or upon argument to be imperfectly stated, it will be remitted to the Judge before whom the trial took place for his amendment. As to the practice decided in New South Wales under 13 Vict., No. 8, see *R. v. Dickson*, 4 S.C.R., 298. It was held in this case that where it was suggested that something had been omitted, which ought to have been inserted, or something inserted which ought to have been omitted, that on application to the Judge he was entitled to say that he finally adhered to the case as stated, and in such case the Court must take his statement as final. The Court must take the facts from the Judge, who is the proper person to state them. See also *R. v. Attorney-General*, 12 V.L.R., 73.

74. (1) If the trial was had in a State in which the principal seat of the Court is not situated, the proper officer of the Court by which the question reserved was determined shall certify the judgment of the Court under his hand and the seal of the Court to the proper officer of the Court in which the trial was had, who shall enter the same on the original record.

Effect of order of Full Court.
Qd. Cr. Code s. 670.

(2) If the convicted person is in custody, the proper officer of the Court by which the question reserved was determined shall also forthwith transmit another certificate of the same tenor under his hand and the seal of the Court to the superintendent of the prison or other person who has the custody of the convicted person. The certificate shall be a sufficient warrant to all persons for the execution of the judgment if it is certified to have been affirmed or as it is certified to be amended, and execution shall thereupon be executed upon the judgment as affirmed or amended: And if the judgment is set aside or arrested the certificate shall

be a sufficient warrant for the discharge of the convicted person from further imprisonment under that judgment, and in that case the superintendent is required forthwith to discharge him from imprisonment under that judgment, and if he is at large on bail the recognisance of bail shall be vacated at the next criminal sitting of the Court in which the trial was had: And if that Court is directed to pronounce judgment, judgment shall be pronounced at the next criminal sitting of the Court at which the convicted person appears to receive judgment.

Certain errors
not to avoid
conviction.
Qd. Cr. Code,
s. 671.

75. A conviction cannot be set aside upon the ground of the improper admission of evidence if it appears to the Court that the evidence was merely of a formal character or not material, nor upon the ground of the improper admission of evidence adduced for the defence.

Appeal from
arrest of judg-
ment.
Ib. s. 672.

76. (1) When the Court before which an accused person is convicted on indictment for an offence against the laws of the Commonwealth arrests judgment at the trial, the Court shall on the application of counsel for the prosecution state a case for the consideration of a Full Court of the High Court or a Full Court of the Supreme Court of the State in manner hereinbefore provided.

(2) On the hearing of the case the Full Court may affirm or reverse the order arresting judgment. If the order is reversed the Court shall direct that judgment be pronounced upon the offender, and he shall be ordered to appear at such time and place as the Court directs to receive judgment, and any Justice of the Peace may issue his warrant for the arrest of the offender.

(3) An offender so arrested may be admitted to bail by order of the Court which may be made in Court or in Chambers, at the time when the order directing judgment to be pronounced is made or afterwards.

No other appeal.

77. Except as aforesaid, and except in the case of error apparent on the face of the proceedings, an appeal shall not without the special leave of the High Court be brought to the High Court from a judgment or sentence pronounced on the trial of a person charged with an indictable offence against the laws of the Commonwealth.

PART XI.—SUPPLEMENTARY PROVISIONS.

Appearance of Parties.

78. In every Court exercising federal jurisdiction the parties may appear personally or by such barristers or solicitors (a) as by the laws and rules regulating the practice of those Courts respectively are permitted to appear therein.

Appearance by
barrister or
solicitor.
U.S. 747.

(a) "**Barristers or solicitors.**"—As to right of barristers and solicitors to practise in federal Courts, see *Jud. Act*, sec. 49.

Application of Laws.

79. The laws of each State (a), including the laws relating to procedure, evidence (b), and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal (c) jurisdiction in that State in all cases to which they are applicable.

State laws to
govern where
applicable.
U.S. 721.

(a) "**The laws of each State.**"—By virtue of this section the High Court of the Commonwealth is called upon to administer in a State the same laws as the State Courts. Accordingly the same questions of interpretation of Statutes and determination of law may arise before different tribunals. When the High Court sits as a Court of Appeal its duty will be to set aside a decision of a State Court with which it does not agree; but when the High Court sits as a Court of original jurisdiction in a State administering the laws of State, should it be guided by the law as determined by the State tribunals? The exercise of that mutual respect and deference which has characterised the Courts in the United States will probably be repeated in the history of our Courts.

The following passage may be taken as an indication of the attitude the High Court will assume towards the decisions of the Supreme Courts of the States. "But it has been decided by Madden, C.J., and by the Supreme Court of Victoria, that the allegation is true in law as well as in fact. This decision has not been appealed from, and its correctness is not now impeachable as between the plaintiff and the State of Victoria. This Court would, I think, in any case, be reluctant as a general rule, to put a different construction upon the statutes of a State from that which the Supreme Court of the State itself has declared to be their true construction; at any rate, unless its decision were directly invited by way of appeal, either from the same Court or from the Court of another State in a case involving the construction of identical words"; *per* Griffith, C.J., *Bond v. The Commonwealth of Australia*, 1 C.L.R., at pp. 22-23. The above section is founded on sec. 721, Revised Statutes of U.S. "The laws of the several States, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at Common Law in Courts of the United States in cases where they apply." By this section there were two Courts of co-ordinate jurisdiction called upon to decide questions upon the same set of laws. How the harmonious action of these Courts

has been secured may be seen in the following passage from the judgment of Bradley J., *Burgess v. Seligman*, 107 U.S., 20, and reprinted in *Foster's Federal Practice*, p. 877 (n):—"The Federal Courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of State constitutions and statutes. Such established rules are always regarded by the federal Courts, no less than by the State Courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal Courts to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the State tribunals, the federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the Courts of the United States, without sacrificing their own dignity as independent tribunals, endeavour to avoid, and, in most cases, do avoid, any unseemly conflict with the well considered decisions of the State Courts. As, however, the very object of giving to the national Courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which, it might be supposed, would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication"; *Burgess v. Seligman*, 107 U.S., 20.

It has been held in the United States that this Statute does not apply to questions of commercial law or those which involve the application of principles of the common law which are general throughout the United States, and although settled by the decision of State Courts are not regulated by a State Statute. In such cases the Federal Courts are not bound by the decisions of the State Courts, in the absence of State Statutes on the subject, such as questions in the law of insurance, the liability for negligence by masters and common carriers, negotiable paper, municipal bonds, bills of lading, master and servant, contracts by private corporations, the distribution of assets of insolvents before the bankruptcy law, the liability of shareholders to creditors in the absence of any particular local statute, private international law, or the conflict of laws, and the measure of damages; *Foster's Federal Practice*, p. 877.

The Federal Courts of the United States on questions not involving the Constitution or laws, or affecting the commercial intercourse or business of the

country at large, but relating solely to a subject-matter within State control, should always follow the rules adopted by the State Courts; *Kowalski v. Chicago G. W. Ry. Co.*, 84 Fed. Rep., 586; *Illinois Trust and Savings Bank v. City of Arkansas*, 40 U.S. App., 257; 76 Fed. Rep., 272; *Forsyth v. Hammond*, 166 U.S., 506. The construction of a State Constitution by a State Court is binding on the Federal Courts where no question affecting the Constitution of the United States is involved; *McCain v. City of Des Moines*, 84 Fed. Rep., 726; *Hoye v. Magnes*, 56 U.S., App., 500; 85 Fed. Rep., 355; *Wade v. Travis County*, U.S. App. 81 Fed. Rep., 742; *Folsom v. Township of Ninety-Six*, 59 Fed. Rep., 67; (but see *Quaker City Nat. Bank v. Nolan County*, 59 Fed. Rep., 660); *Louisville v. Nashville Ry. Co.* (1901), 183 U.S.R., 563.

A decision by a State Court as to whether a Statute of the State has been duly enacted is binding on the Courts of the United States; *Crowther v. Fidelity Ins. T. & S. D. Co.*, U.S. App., 85 Fed. Rep., 41; *Wilkes v. County of Coler* (1900), 180 U.S.R., 506. Decisions of the State Courts construing its Statutes are binding on the Federal Courts; *Sutherland Innes Co. v. Village of Erart*, U.S. App., 86; Fed. Rep., 597; *Louisville and Nashville Ry. Co. v. Kentucky* (1901), 183 U.S.R., 503; *Wilson v. Standefer* (1901), 184 U.S.R., 399. For further authorities see *Desty's Federal Procedure*, § 241, p. 808, *et seq.*

(b) "**Evidence.**"—As to statute law relating to evidence in High Court, see H.C.P. Act, secs. 16 to 22.

(c) "**Courts exercising federal jurisdiction.**"—These words mean any Court when exercising federal jurisdiction, and include the High Court or any Court created by Parliament; *Acts Interpretation Act* 1901, sec. 26.

80. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment (a), the common law (b) of England as modified by the Constitution and by the statute law in force in the State in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

Common law to govern.
U.S. 722.

(a) "**Remedies or punishment.**"—When the provisions of the laws of the Commonwealth are insufficient to carry them into effect, or to provide adequate remedies or punishment, recourse must be had to the Common Law. The maxim *ubi jus ibi remedium* applies where the rights are conferred by Statute; *Broom's Legal Maxims*, 7th ed., p. 169. There are three classes of cases in which a statutory liability may be established. One is where a liability existing at Common Law is affirmed by a Statute which gives a special remedy different from that which exists at Common Law; there, unless the words of the Statute expressly, or by necessary implication (*Great Northern Fishing Co. v. Edgehill*, 11 Q.B.D., 225), take away the Common Law remedy, either that, or the statutory remedy, may be

pursued at election; *Jones v. Reed*, 16 V.L.R., 372. The second is where the Statute gives the right to sue merely, but provides no particular form of remedy; then a person can only proceed by action at Common Law. The third is where a liability, not existing at Common Law, is created by a Statute which, at the same time, gives a particular remedy for enforcing it; there the remedy provided by the Statute must be followed; for it is a rule of law that an action will not lie for the infringement of a right created by a Statute, where another specific remedy is provided by that Statute; *Broom's Legal Maxims*, p. 170; *Stevens v. Jeacocke*, 11 Q.B., 731; *Peebles v. Onwaidtwistle, U.D.C.*, (1897) 1 Q.B., 625; *Barraclough v. Brown*, (1897) A.C., 615; *Sargood v. Britten*, 21 V.L.R., 286. There may, however, be a further remedy by injunction; *Cooper v. Whittingham*, 15 C.D., 501. A writ of prohibition was refused where a special remedy was conferred by Statute: *Ex parte Carey, re Bottrel*, 4 V.L.R. (L.), 408. As to the Common Law remedy by action by party grieved by another's non-compliance with a Statute, see *Wilberforce's Statute Law*, 1881 ed., p. 70; *Shepherd v. Hills*, 11 Ex., at p. 67, per Parke, B.; *Hutchins v. Kilkenny Rail Co.*, 9 C.B., 536. Where a Statute required a railway company to issue a warrant to a sheriff for the purpose of his summoning a jury to assess the value of land which the company had agreed to purchase, it was held an action for mandamus lay against the company; *Fotherby v. Metropolitan Rail Co.*, L.R., 2 C.P., 188. Another Common Law remedy for enforcing Statutes is that of indictment. "What the law says shall not be done, it becomes illegal to do, and it is, therefore, the subject-matter of an indictment, without the addition of any corrupt motives"; *R. v. Sainsbury*, 4 T.R., at p. 457, per Ashhurst, J. If a Statute enjoin an act to be done without pointing out any mode of punishment, an indictment will lie for disobeying the injunction of the Legislature; *Rez v. Davis*, Say., 133. See further authorities cited in *Wilberforce's Statute Law*, p. 70; *Russell on Crimes and Misdemeanours*, 6th ed., vol. I., p. 199.

(b) "**Common Law.**"—The Common Law of England forms part of the laws of each State of the Commonwealth, and as such may be administered by the High Court under the preceding section. The High Court being a Court of Appeal makes it, subject to review by the Privy Council, the final arbiter of the Common Law in all the States. In the United States the decision of each State being final as to what the Common Law of the State is, the Common Law in one State may come in time to be widely different from the Common Law in another. This section expressly declares the Common Law shall to the extent prescribed govern all Courts exercising federal jurisdiction. Apart from this enactment it has been contended that there is no federal Common Law, "except in relation to the executive powers of the Crown it is submitted that there cannot be any federal Common Law in Australia, and that the Federal Courts of the Commonwealth will not possess any jurisdiction under the Common Law"; *A. Inglis Clark's Australian Constitutional Law*, at p. 192. A federal Common Law has been held to exist in the United States. "There is no body of federal Common Law separate and distinct from the Common Law existing in the several States in the sense that there is a body of Statute law enacted by Congress and distinct from the body of Statute law enacted by the several States. But it is an entirely different thing to hold that there is no Common Law in force generally throughout the United States, and that the countless multitude of inter-State commercial transactions are subject to no rules, and burdened by no restrictions than those expressed in the Statutes of Congress." It was accordingly

held that a telegraph company was liable in damages independent of any statute for unjust discriminations in its charges for inter-State commerce; *Western U. &c. Co. v. Call Pub. Co.* (1900), 181 U.S., 92, *per* Brewer, J.; *Foster's Federal Practice*, p. 880.

"In contradistinction to the Common Law of the several States there is growing up in the federal Courts a Common Law of the United States, based equally upon the Common Law of England and of the several States. It is for the most part of recent development, and has been occasionally criticised, not unnaturally with some severity, in the State Courts. The federal Courts have a jurisdiction prescribed by the Constitution of the United States, which is in some sort super-imposed upon the jurisdiction of the State Courts, sometimes conflicting, sometimes concurrent in a particular State with that of the State tribunals, and at other times exclusive and independent, but in every case defined and limited by the federal Constitution. In these Courts, both in civil and criminal matters, there has to be recognized, along certain lines, a Common Law of the United States which is certain to assert and reassert itself more and more as the federal jurisdiction grows and develops, particularly in cases involving the law merchant, the law of commercial paper and the like"; "American Law" *Encyclopedia of Law*, vol. 1., at p. 242. The States may by statute modify the Common Law of their States. Apart from such modification, by virtue of the right of independent interpretation possessed by the High Court and of its appellate jurisdiction, a uniform system of Common Law will be administered throughout the Commonwealth. See also *Quick and Garran's Annot. Const.*, p. 785.

81. The Justices of the High Court, and the Judges and magistrates of the several States who are empowered by law to authorize arrests for offences against the laws of the Commonwealth, shall have the like authority to hold to security of the peace (a) and for good behaviour in matters arising under the laws of the Commonwealth as may be lawfully exercised by any Judge or Magistrate of the respective States in other cases cognisable before them.

Security of the peace and for good behaviour.
U.S. 727.

(a) "**Peace.**"—There is a peace of the United States, as distinguished from the peace of the individual State, a breach whereof is possible within the territorial limits of the State, as by an assault upon a federal officer or Judge; *In re Neagle*, (1890) 135 U.S., 69.

Venue (a).

82. Suits to recover pecuniary penalties and forfeitures under the laws of the Commonwealth may be brought either in the State or part of the Commonwealth where they accrue or in the State or part where the offender is found.

Venue in suits for penalties.
U.S. 732.

(a) "**Venue.**"—See as to venue generally, note to H.C.P. Act, sec. 25.

Venue in suits
for taxes.
U.S. 733.

83. Suits to recover taxes (a) accruing under any revenue law of the Commonwealth may be brought either in the State or part of the Commonwealth where the liability for the tax occurs or in the State or part where the debtor resides.

(a) "**Recover Taxes.**"—Under the corresponding section of the Revised Statutes U.S., sec. 733, it has been held that a suit for taxes cannot be brought in any other district than where the tax accrues or where the defendant resides; *U. S. v. N. Y. H. R. R. Co.*, 10 Ben., 144; Fed. Cas., No. 15874.

Venue in suits
for forfeiture.
U.S. 734.

84. Proceedings on seizures (a) made on the high seas for forfeiture under any law of the Commonwealth may be prosecuted in any State into which the property seized is brought. Proceedings on such seizures made within any State or part of the Commonwealth shall be prosecuted in the State or part where the seizure is made, except in cases when it is otherwise provided by law.

(a) "**Seizures.**"—The following cases have been decided on the corresponding sec. 734 Revised Statutes U.S.:—Where a seizure is made on the high seas jurisdiction attaches in the Court of any district into which the property is brought; *The Merino*, 9 Wheat., 391; *The Abby*, 1 Mason, 360; Fed. Cas., 14; *The Little Ann*, 1 Paine, 40; Fed. Cas., No. 8397. So jurisdiction as to forfeitures is given where the seizure is made; *Keene v. U.S.*, 5 Cranch., 304; *The Ann*, 9 Cranch., 289; *The Octavia*, 1 Gall., 488; Fed. Cas., No. 10422; *The Reindeer*, 2 Wall., 383; *U.S. v. Barrels*, 3 Int. Rev. Rec., 114; Fed. Cas., No. 16502. A district Court has no jurisdiction *in rem* where the seizure was made in another district; *The Little Ann*, 1 Paine, 40; Fed. Cas., No. 8397.

Property seized
as forfeited.
U.S. 934.

85. All property taken or obtained by any officer or person under the authority of any revenue law of the Commonwealth shall be deemed to be in the custody of the law, and subject only to the orders and judgments of the Courts having jurisdiction thereof under this or any Act.

Rules of Court (a).

Rules of Court.

86. The Justices of the High Court or a majority of them may make Rules of Court not inconsistent with this Act for carrying this Act into effect, and in particular for the following matters, that is to say:—

- (a) Appointing and regulating the sittings of the High Court and of the Justices;
- (b) Regulating procedure pleading and practice in the High Court in civil or criminal matters in the

exercise both of its original and of its appellate jurisdiction ;

- (c) Regulating any matters relating to the duties of the officers of the High Court and of the Marshal and his Deputies and officers ;
- (d) Prescribing the forms to be used for the purposes of the proceedings of the High Court ;
- (e) Prescribing and regulating the fees to be charged by practitioners practising in the High Court for the work done by them in relation to proceedings in the Court and for the taxation of their bills of costs, either as between party and party or as between solicitor and client ;
- (f) Prescribing the fees to be collected by the officers of the High Court and by the Marshal and his officers in respect of the proceedings in the Court or of the execution of the process thereof ;
- (g) Prescribing the extent to which the provisions of this Act shall be applicable to the Courts of Territories of the Commonwealth ;
- (h) Generally regulating all matters of practice and procedure in the High Court and other federal courts, and so far as is necessary in courts of federal jurisdiction.

(a) **Rules of Court.**—The power of making rules is now subject to the provision of the *Rules Publication Act* 1903. As to power of Court to make rules, see *supra*, p. 49 ; H.C.P. Act, secs. 16, 32-33 ; and note to Schedule to H.C.P. Act, "Rules of Court."

87. Every Rule of Court made in pursuance of the last preceding section shall be laid before the Senate and the House of Representatives within forty days next after it is made if the Parliament is then sitting or if the Parliament is not then sitting then within forty days after the next meeting of the Parliament ; and if an Address is presented to the Governor-General by either House of the Parliament within the next subsequent forty sitting days of the House praying that any

To be laid before the Parliament.

England.
Qd.
Va.

such Rule may be annulled the Governor-General may thereupon annul it; and the Rule so annulled shall thenceforth become void and of no effect but without prejudice to the validity of any proceedings which have in the meantime been taken under it.

Section 65.

THE SCHEDULE.

FORM OF CERTIFICATE OF JUDGMENT.

Nokes *v.* Commonwealth [*or as the case may be*].—I hereby certify that A.B., of _____, &c., did on the _____ day of _____ obtain a judgment of the High Court in his favour, and that by such judgment the sum of £ _____ was awarded to him.

C. D., Registrar.

HIGH COURT PROCEDURE ACT 1903.

No 7 of 1903.

An Act to regulate the Practice (a) and Procedure of the High Court.

[Assented to 28th August, 1903.]

BE it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

PART I.—PRELIMINARY.

1. This Act may be cited as the *High Court Procedure (a)* Short title. Act 1903, and is divided into parts as follows:—

Part I.—Preliminary, ss. 1, 2.

PART II.—Pro-
cedure of the
High Court

{ Seals, &c., ss. 3-5.
District Registries, ss. 6-11.
Trial of Issues, ss. 12-15.
Evidence, ss. 16-22.
Defects and Errors, ss. 23, 24.
Change of Venue, s. 25.
Judgment and Execution, ss. 26-28.
Receivers and Managers, ss. 29, 30.
Actions by and against the Marshal, s. 31.
Rules of Court, ss. 32-34.

PART III.—Ap-
peals to the
High Court

{ Security, ss. 35, 36.
Procedure, ss. 37-39.

THE SCHEDULE.

(a) "**Procedure.**"—For definition of Practice and Procedure see *supra*, p. 42.

Interpretation.

2. In this Act, unless the contrary intention appears—

“Suit” (a) includes any action or original proceeding between parties ;

“Cause” includes any suit, and also includes criminal proceedings ;

“Matter” includes any proceeding in a Court, whether between parties or not, and also any incidental proceeding in a cause or matter ;

“Plaintiff” includes any person seeking any relief against any other person by any form of proceeding in a Court ;

“Defendant” includes any person against whom any relief is sought in a matter, or who is required to attend the proceedings in a matter as a party thereto ;

“Justice” in the expressions “Court or Justice” (b) or “Court or a Justice” means a Justice of the High Court sitting in Chambers.

“The Chief Justice” includes any Justice upon whom the powers and duties of the Chief Justice devolve for the time being ;

“Judgment” includes any judgment decree order or sentence ;

“Full Court” (c) means two or more Justices of the High Court sitting together ;

“Appeal” includes an application for a new trial and any proceeding to review or call in question the proceedings decision or jurisdiction of any Court or Judge.

(a) “**Suit.**”—This section is almost a reprint of the *Judiciary Act*, sec. 2. See notes thereon, *supra*, p. 73.

(b) “**Court or Justice.**”—See notes to *Jud. Act*, sec. 16, *supra*, p. 90.

(c) “**Full Court.**”—Generally as to Full Court see *Jud. Act*, sec. 19, *supra*, p. 94.

PART II.—PROCEDURE OF THE HIGH COURT.

Seals.

Seals.

3. (1) The High Court shall have and use as occasion requires a Seal, having inscribed thereon the words “The Seal of the High Court of Australia” (a). Such seal shall be kept at the Principal Registry, in such custody as the Chief Justice directs.

(2) There shall be kept at every District Registry, in such custody as the Chief Justice directs, a duplicate of the Seal having inscribed thereon the additional word "Registry" with the name of the State prefixed, and also if there are more District Registries than one in the State, such other distinctive word as the Chief Justice directs.

(3) There shall also be kept and used at the Principal Registry and at the several District Registries such other seals as are required for the business of the Court. Such seals shall be in such form and shall be kept in such custody as the Chief Justice directs.

(4) All documents and all exemplifications and copies thereof purporting to be sealed with any such seal shall in all parts of the Commonwealth be receivable in evidence without further proof of the seal.

(a) "**Seal of the High Court.**"—As to the use of seals see sec. 4, *infra*; as to the use of the Great Seal see Or. 49, r. 1; as to the keeping of an office seal at every Registry and its use see Or. 49, r. 2.

4. (1) All writs commissions and process issued from the High Court shall be in the name of the King, and shall be under the Seal (a) of the Court or such other seal (b) as is prescribed by Rules of Court, and shall be signed by a Registrar or other proper officer (c). Use of seals.
U.S. 911.

(2) They shall be tested (d) in the name of the Chief Justice, or when the office of Chief Justice is vacant in the name of the senior Justice.

(a) "**Seal of the Court.**"—This section is taken from the U.S.R.S., sec. 911, upon which the following cases have been decided:—A summons or notice must be under the seal of the Court and signed by the clerk; *Dwight v. Merritt*, 18 Blatchf., 305; 4 Fed. Rep., 314; *Peaslee v. Haberstro*, 15 Blatchf., 472; Fed. Cas., No. 10884. A warrant in admiralty not under seal nor signed by the clerk is not sufficient, although signed by the Judge; *Bowler v. Eldridge*, 18 Conn., 1; and if void on its face it is no protection to the marshal; *ib.* The provisions of this section are held obligatory on parties and Courts; *Thompson v. Railroad Companies*, 6 Wall., 134. See also *Desty's Federal Procedure*, vol. II., § 433. In *Mulligan v. Burnett*, 2 S.C.R. (Q.), 29, it was held that where a writ of *ca re* had been issued under the hand of a Commissioner, but without his seal, the omission was an irregularity and not sufficient ground for setting aside the writ.

(b) "**Other Seal.**"—As to the use of an office seal see Or. 49, r. 2. As to sealing summons in a Chamber application, see Or. 40, r. 2.

(c) "**Signed by a Registrar or other officer.**"—As to a Registrar's clerk signing writs and other documents, see Or. 49, r. 3.

(d) "**Tested.**"—Under the United States section a writ of error bearing the teste of the clerk and not of the Chief Justice of the Supreme Court was held void; *Wells v. M'Gregor*, 13 Wall., 188. So also a paper purporting to be a *venire facias* tested in the name of the deputy clerk; *United States v. Antz*, 16 Fed. Rep., 119. A writ otherwise regular, but omitting the name of the Lord Chancellor, was held good; *M'Nay v. Alt*, 66 L.T., 832. The mis-statement in the writ of the name of the Chief Justice was held not to be a ground for setting the writ aside; *Folkard v. Fitzstubs*, 1 F. & F., 376.

Date of process.
U.S. 912.

5. All writs and process (a) issued from the High Court or any other Court exercising federal jurisdiction shall be dated (b) as of the day on which they are issued.

(a) "**Process.**"—As to definition of "process," see *Jud. Act*, sec. 25, *supra*, p. 99.

(b) "**Day . . . issued.**"—A writ of summons issued under the provisions of the *Instruments Act* 1890, sec. 39 (Victoria), was tested as of a date later than the date on which it was served, was held to be irregular, and an appearance under protest was held not to waive the irregularity; *Hadley & Co. v. Henry*, 21 V.L.R., 646. A mistake in the date in the teste of the copy of a writ, in other respects accurate, was held not to be fatal; *Wesson Bros. v. Stalker*, 47 L.T., 444. If a defective writ is re-sealed, it ought to be dated as of the date of re-sealing; *Knight v. Warren*, 7 D.P.C., 663. The Court has no power to alter, by way of amendment, the date of a writ of summons; *Clark v. Smith*, 2 H. & N., 7; 27 L.J. (Ex.), 155. In *Clarke v. Braddaugh*, 8 Q.B.D., 63, it was held to issue a writ of summons was not a judicial act, and the Court might inquire at what period of the day it was issued. When the writ or other process has been signed by the Registrar, or his clerk, and is sealed with the proper seal, it is thereupon deemed to be issued; Or. 49, r. 3.

District Registries.

Proceedings in
District
Registries.
Jud. Act 1873
sec. 64.

6. (1) Subject to this Act and to Rules of Court, writs of summons for the commencement of causes in the High Court may be issued in any Registry (a), and every Registrar shall issue (b) such writs when required, and unless an order to the contrary is made by the High Court or a Justice all such further proceedings as may and ought to be taken by the respective parties to the cause, down to and including final judgment and execution, may be taken and recorded in the District Registry in which the cause is pending.

English Rules,
O. 12 rr. 5-7.

(2) Provided that if a defendant against whom a writ is issued in a District Registry neither resides (c) nor carries on

business in the State in which the Registry is situated, he may appear (d) either at that Registry or at the Principal Registry.

(3) If any defendant appears at the Principal Registry the cause shall, subject to the power of transfer, proceed in that Registry, and the proceedings in the cause shall be transmitted thereto by the District Registrar in the manner directed by the next following section.

(a) "**Registry.**"—As to the Principal and District Registries see *Jud. Act*, sec. 11, *supra*, p. 87.

(b) "**Shall issue.**"—The issue of the writ is not a judicial act; *Clarke v. Bradlaugh*, 8 Q.B.D., 63. Such a writ should notify the option the defendant has as to entering appearance; *Or. 4, r. 7.*

(c) "**Neither resides nor carries on business.**"—If a writ is issued in the District Registry of Victoria by a resident of Victoria against a defendant who neither resides in Victoria nor carries on business in Victoria he may, at his option, either enter an appearance in the Victorian District Registry, or in the Principal Registry. Subject to the power of transfer vested in the Court the cause proceeds in that Registry in which the defendant properly enters an appearance.

The definition of the term "resident" in sec. 75 (iv.) of the Constitution is discussed, *supra*, at p. 116.

RESIDENCE OF CORPORATION.—A corporation dwells at the place where it carries on its business; *Taylor v. Crowland Gas. Co.*, 24 L.J. (Ex.), 233; *Adams v. G. W. Railway*, 30 L.J. (Ex.), 124. A company incorporated for the manufacture and sale of goods dwells at the place of manufacture and sale and not at its registered office; *Keynsham Blue Lias Lime Co. v. Baker*, 33 L.J. (Ex.), 41.

A company dwells where the substantial business of the company and its negotiations are carried on, and not necessarily in the locality where its property is situated, and its immediate objects carried out; *Aberystwith P.P. Co. v. Cooper*, 35 L.J.Q.B., 44. The residence of a company is a matter of fact. A company which held land at Newcastle upon which it was sinking a shaft, and whose registered office was at Sydney, was held to reside at Newcastle within the meaning of the *District Courts Act*; *Holburd v. Burwood Coal Co.*, 11 N.S.W.L.R., 365.

A foreign company which carries on business in Australia is deemed to reside here for purposes of service; *Newby v. Van Oppen*, L.R., 7 Q.B., 293; *Haggin v. Comptoir*, 23 Q.B.D., 519; *La Bourgoyne*, (1899) P. 1; (1899) A.C., 431; *Dunlop Pneumatic Tyre Co. Limited v. Actien Gesellschaft &c.*, (1902) 1 K.B., 342 (C.A.); *Bowden Bros. & Co. v. I. M. & T. Ins. Co.* (1902), S.R. (N.S.W.), 257. See the remarks of Bacon, V.C., in *Lhonneux, Lemon & Co. v. Hong Kong and Shanghai Banking Corporation*, 33 Ch., 446:—"They hire an office, write up their name, and beyond all question stamp upon themselves and upon their place of business here the assumption that they carry on business."

TEMPORARY RESIDENCE.—A defendant who, at the time of an action brought, has no permanent residence, dwells at the place of his temporary residence;

Alexander v. Jones, 35 L.J. (Ex.), 78. See also *Macdougall v. Patterson*, 21 L.J.C.P., 27.

SHIFTING RESIDENCE.—A person may, for the purposes of the *District Courts Act*, be resident in two or more districts; *Ex parte McEvoy*, 7 S.C.R., N.S.W. (L.), 145; so also with respect to the *Small Debts Recovery Act*, sec. 23; *Ex parte Slate*, 7 W.N. (N.S.W.), 96. As to two or more residences, see also *Pilgrim v. Knatcebull*, 34 L.J.C.P., 257; *Bailey v. Bryant*, 1 El. & El., 340; *Butler v. Ablewhite*, 28 L.J.C.P., 292. A person who resided at S. and visited A. for the purpose of contesting an election was held not to be a resident in A., within the meaning of the *District Courts Act*; *Ex parte Asher*, 4 S.C.R. (N.S.W.), 71. A contractor who built a bridge at A., where he slept for two or three months, but ordinarily lived at S., was held, under the *District Courts Act*, not to reside at A.; *Ex parte Baillie*, 5 S.C.R., 17. If a nominal defendant, under the *Claims against the Commonwealth Act*, is a Minister of the Crown, his official residence is at the seat of Government; *Boon v. Young*, 16 N.S.W.L.R. (L.), 139.

(d) “**Carries on business.**”—A foreign company which does no more than employ a commercial traveller to receive orders in a State, and to forward them to its office abroad, does not carry on business in that State; *Pearce v. Tower Manufacturing and Novelty Co.*, 24 V.L.R., 506. See the cases in preceding note as to where a foreign company resides. See also notes to Or. 7, r. 6.

Certain companies have been held to carry on business only at the place where the general management is carried on; *Brown v. L. & N. W. Ry.* 32 L.J.Q.B., 318; see also *Shields v. G. N. Ry.*, 30 L.J.Q.B., 331; *Taylor v. Crowland Gas and Coke Co.*, 24 L.J. (Ex.), 233; *Le Tailleur v. S. E. Ry.*, 3 C.P.D., 18; *Rogers v. L. C. & D. Ry.*, 26 W.R., 192. A clerk in a Government office does not carry on business; *Sangster v. Cave*, 19 L.J. (Ex.), 314. A professional man who resides in one place, and attends clients in another, carries on business at the latter place; *Mitchell v. Hender*, 23 L.J.Q.B., 273. A company carrying on business in London and which employs in a country town a general commission agent who transacts the company's business in such town, in an office for which the company pay him rent, does not carry on business within the meaning of 9 & 10 Vict., c. 95, s. 128; *Corbett v. General Steam Navigation Co.*, 28 L.J. (Ex.), 214. A firm carrying on business in Scotland, with a branch office situate within the jurisdiction of a County Court, was held to carry on business within the jurisdiction; *Weatherley v. Calder*, 61 L.T., 508. See also authorities cited *Daniell's Chancery Practice*, vol. 1., p. 267.

(d) “**Appear.**”—As to appearance generally, see Or. 9; as to times for appearing, see Or. 4, r. 10. Compare the English practice. *Chitty's Archbold*, 14th ed., 252.

Transfer of
causes from one
Registry to
another.
Jud Act 1873
s. 65.

7. (1) Any party to a cause in the High Court may at any time apply to the Court or a Justice for an order that the cause be transferred from the Registry in which it is pending, if that is not the Principal Registry, to the Principal Registry or some other Registry, or from the Principal Registry to a District Registry, and the Court or Justice may in his discretion make an order accordingly.

(2) Thereupon the proceedings and such original documents (if any) as are filed in the Registry in which the cause is pending shall be transmitted by the Registrar of that Registry to the Registry to which the cause is ordered to be transferred, and the cause shall thenceforth proceed in that Registry in the same manner as if it had been there originally commenced, and may thereafter be again transferred in like manner to any other Registry.

8. (1) When a cause is pending in a District Registry and any party desires to make an application therein to the Court or a Justice, but is unable to do so by reason of there being no Justice of the High Court present in the place where the Registry is situated, the party may lodge with the District Registrar a request that the cause be transferred for the purpose of the application only to the Principal Registry or to some nearer District Registry at which a Justice of the High Court is present or appointed to sit, and the cause shall thereupon without further order be transferred accordingly.*

Temporary
transfer.
Qd. rules.

“(1) When any party to a cause desires to make an application therein to the Court or a Justice, and no Justice of the High Court is present in the place where the Registry in which the cause is pending is situated, the party may lodge with the Registrar of that Registry a request that the cause be transferred, for the purpose of the application only, to some other Registry at a place where a Justice is present or is appointed to sit, and the cause shall thereupon without further order be transferred accordingly.”

Temporary
transfer.
(H.C.P. Amend-
ment Act).

(2) The *District* Registrar shall thereupon transmit the request to such other Registry together with such documents as are necessary for the purpose of the application.

(3) The application may then be heard and disposed of at such other Registry, and as soon as it has been disposed of the cause shall without further order be retransferred to the first-mentioned *District* Registry, and all documents relating to it shall be retransmitted to that Registry.

(4) No fee shall be payable in respect of any such transfer or retransfer.

* NOTE.—Sec. 8 of *High Court Procedure Act* 1903 has been amended by the *High Court Procedure Amendment Act* 1903, which repealed sub-sec. 1, and substituted therefore a new sub-section printed above. The sub-secs. (2) (3) and (5) were amended by the omission of the word “*District*” wherever it occurred.

(5) In any of the cases mentioned in this section, if the application is to be made upon notice to any person, the notice may be given of the application to be made before the Court or a Justice at the Registry to which the cause is transferred, on a day to be fixed by the *District* Registrar of the first-mentioned Registry.

Transmission of
documents by
telegraph.
Qd. Insolvency
Act of 1874.

9. (1) In any such case as mentioned in the last preceding section, any party desiring to make an immediate application to the High Court or a Justice may, instead of requesting that the cause be transferred to such other Registry, require the *District* Registrar to transmit by telegraph to such other Registry the contents of all such documents filed in the first-mentioned *District* Registry as are necessary for the purpose of the application, and the *District* Registrar shall, on payment by such party of the expense of transmission, transmit them accordingly.

(2) The copy so received by telegraph shall be filed in such other Registry, and shall be receivable in evidence for the purpose of the application to the same extent as the original documents would be admissible.

(3) If the application is to be made upon notice to any person, the notice shall state that the documents will be transmitted by telegraph to such other Registry.

(4) If any person to whom notice is given requires any other documents to be transmitted by telegraph to such other Registry, they shall be transmitted and shall be receivable in evidence in like manner.

(5) Evidence of service of the notice may also be so transmitted.

NOTE.—The word “*District*” has been repealed by the *High Court Procedure Amendment Act* 1903.

Orders may be
sent by
telegraph.

10. When in any of the cases mentioned in the two last preceding sections an order has been made by the Court or a Justice at a Registry other than that in which the cause is pending, the Registrar of that Registry shall at the request and expense of either party and without payment of any further fee inform the *District* Registrar of the first-mentioned Registry by telegraph of the effect of the order, and thereupon and without

waiting for receipt of the order full effect shall be given to the order.

NOTE.—The word “District” has been repealed by the *High Court Procedure Amendment Act 1903*.

11. In any of the cases aforesaid a *District Registrar* may by consent of the parties instead of transmitting by telegraph the full contents of any document transmit a summary thereof certified by him to be complete and correct, and the summary may be received and acted upon by the Court or Justice as if it were a copy of the original document. Précis of evidence.

NOTE.—The word “District” has been repealed by the *High Court Procedure Amendment Act 1903*.

Trial of Issues.

12. In every suit in the High Court, unless the Court or a Justice otherwise orders, the trial (a) shall be by a Justice without a jury. Trial without jury.
U.S. 689.

(a) “**Trial without a jury.**”—It would appear that it was the intention of the Parliament to limit the trial of actions before juries, and to require that a jury should only be had in cases that commended themselves to the discretion of the Justices of the High Court. In criminal cases sec. 80 of the Constitution provides that trials “on indictment” shall be by jury. It is left open to Parliament to allow the trial of civil issues by juries with such limitations, if any, as may be thought fit; Const., sec. 51 (xxxix.); and it has accordingly been enacted that in every suit the trial shall be by a Justice without a jury unless the Court or a Justice otherwise orders. Trial by jury in civil cases in the High Court is not a matter of right. Provisions in the Constitutions of the several States as well as in the Constitution of the United States, secure to suitors a right to trial by jury in civil issues. Trial by jury in the United States can be claimed as a matter of right only in cases suitable for that mode of trial, and where the right existed at the time of the adoption of the particular Constitution. It cannot be claimed as a matter of right in equity cases, admiralty cases, and summary proceedings; *Black’s Constitutional Law* (2nd ed.), p. 510.

DISCRETION.—Under this section the power to grant a jury is discretionary. The High Court may, if it thinks fit, allow by order in each case, a trial by jury in those civil cases in which, in the States, the jury is allowed. With regard to actions in the High Court, similar to those that could formerly only have been brought in the Court of Chancery, the High Court may exercise a similar discretion with respect to allowing a jury. “In such cases the parties have no absolute right to a trial by jury, but the Court will not exercise its discretion so as to deprive a party of his right to a trial by a jury in any case which is of a nature fit to be so tried; and a trial without a jury should not be directed unless the action belongs to that class of actions which a jury is not, as a rule, competent to deal with, either

from their great complexity as regards facts, or from fact and law being so intermingled that it would be difficult, if not impossible, to direct a jury by separating the law from the fact, or because the questions, as regards the law, are of such a delicate nature, and require a knowledge of such refined law, that they could not be conveniently presented to a jury"; *Daniell's Chanc. Prac.*, 7th ed., p. 574.

SCIENTIFIC CASES.—A jury ought to be refused where the costs thereby occasioned would be out of proportion to the appropriateness of a jury as a tribunal; also, if it be clearly shown that the case involves some questions of an abstruse or scientific nature, or that delay or embarrassment will be caused. *Per* Madden, C.J., *Cowie v. Berry Consols G.M. Co.* (No. 2), 24 V.L.R., 212; or the trial of the action would involve a lengthy examination of inventories and other documents; *Jenkins v. Carruthers*, 2 A.L.R., 72; *Henry v. The Manufacturing Agency Ltd.*, 23 A.L.T., 1; or in an action involving scientific and local investigation which cannot be conveniently tried by a jury; *Askew v. Syme*, 18 V.L.R., 583.

EQUITY CASES.—In cases formerly cognisable by the Court in its equitable jurisdiction a trial by jury would not be directed unless a simple issue of fact was involved which would decide the action; *Boyle v. Basan*, 8 A.L.T., 63; nor would it be directed where there was a mixed question of fact and law; *Goodsell v. National Bank of Australasia*, 6 W.N. (N.S.W.), 55. A trial by jury was refused where the plaintiff asked for a declaration that the defendants were trustees for him of certain shares and for a transfer of shares to him, and in the alternative damages; *Biggs v. Kelly*, 24 V.L.R., 402; also in an action for specific performance; *Boyle v. Basan*, 8 A.L.T., 62.

In granting an order for the trial of an action before a Judge and a jury the Judge has no power to reserve to himself the right to dispense with the jury during the trial if he should think fit to do so; *Queensland Investment and Land Mortgage Co. Ltd. v. Grimley*, 4 Q.L.J., 224.

Actions for compensation under the *Property for Public Purposes Acquisition Act* 1901, must be without a jury; sec. 16.

Every trial of an issue of fact with a jury shall be held before a single Justice unless it is specially ordered to be held before two or more Justices; Or. 30, r. 5.

As to procedure see Or. 30, r. 2.

Power of Court
to direct trial of
issues.
Qd. S.C. Act, s.
61.

13. The High Court or a Justice may, in any suit in which the ends of justice appear to render that mode of inquiry expedient, direct the trial with a jury of the suit or any issue of fact (a), and may for that purpose make all such orders and issue all such writs and cause all such proceedings to be had and taken as the Court or Justice thinks necessary; and upon the finding of the jury the Court or Justice may give such decision and pronounce such judgment as the case requires.

(a) "**Issues of fact.**"—During the hearing of an appeal the Full Court of Victoria directed an issue to be determined by a jury as to whether an alleged sale

or conveyance by a defendant had been real; *Howell v. Harding*, 12 V.L.R., 538. The Court should direct an issue where serious questions arise as whether a document is a forgery or not; *Blunt v. Terry*, 5 W.N. (N.S.W.), 50.

See also Or. 30, r. 3. As to trial of issues of fact without pleading, see Or. 29, r. 9, *et seq.*

14. In any case in which the High Court or a Justice is authorized to direct the trial of an issue or in which a new trial (a) is granted, the Court or Justice may impose such conditions (b) on the parties respectively and may direct such admissions (c) to be made by them or either of them for the purpose of the trial or new trial as are just; and in the case of a new trial may grant it either generally or on some particular points only as the Court or Justice thinks fit, and may order that the testimony of any witness examined at the former trial (d) may be read from the Justice's notes instead of his being again examined in open court.

Issue and new trials.
Qd. S.C. Act, s. 62.

(a) "**New trial.**"—As to power of Court to grant a new trial see *Jud. Act*, sec. 36, *supra*, p. 154.

(b) "**Conditions.**"—Under the practice of the Common Law Courts, unless the new trial was a matter of right, as in the case of a misdirection of the Judge, it might have been directed upon terms, such as that witnesses infirm or going beyond the sea should be examined upon interrogatories, or that their evidence should be read from the Judge's notes of the first trial, that certain documents may be produced at the trial or that certain facts not intended to be litigated may be admitted; *Daniell's Chan. Prac.*, 7th ed., vol. 1., p. 612; *Chitty's Archbold*, 14th ed., vol. 1., p. 750.

(c) "**Admissions.**"—Under a similar section, sec. 42 of 5 Vict., No. 9 (N.S.W.), where two issues were involved in a case on a new trial motion, and one was decided in favour of the plaintiffs and one in favour of the defendants, the Court, in granting a new trial on the motion of the defendants, ordered the defendants to make an admission as to the former issue, so as to prevent that issue being tried again; *Denham v. Foley*, 15 W.N. (N.S.W.), 145.

(d) "**Testimony of witness examined at former trial.**"—Where a new trial had been ordered, and an application was subsequently made under 5 Vict., No. 9, sec. 42 (N.S.W.), for leave to have the evidence of a witness who had died since the first trial read at the second trial, the Court refused the application on the ground that it ought to have been made when the rule for a new trial was made absolute. Martin, C.J., remarked:—"No harm can arise to the defendant in this case by the refusal to grant this application, because at Common Law on the death of a witness after having given his evidence in the first trial his evidence can be read from the notes of any person who took it down. But the most satisfactory course would be to read the evidence from the Judge's notes"; *Coulon v. McGuigan*, 5 N.S.W.L.R. (1.), 205.

Juries.
U.S. 800.

15. (1) The laws of each State (*a*) relating to the qualification of jurors, the preparation of jury lists and jury panels, the summoning, attendance, and impanelling of juries, the number of jurors, the right of challenge, the discharge of juries, the disagreement of jurors, and the remuneration of jurors, for the purposes of the trial of civil matters pending in the Supreme Court of that State, or relating to any other matters concerning jurors after they have been summoned or sworn, shall extend and be applied to civil matters in which a trial is had with a jury in the High Court in that State, so that the lists of jurors shall be deemed to be made as well for the purposes of the High Court as of the Supreme Court of the State.

(2) But the panel of jurors shall be made out and the jurors shall be summoned by officers of the Commonwealth.

(3) Every officer of a State who has the custody of any jury list shall furnish a copy thereof to the proper officer of the Commonwealth on demand and on payment of a reasonable fee.

(a) "**Laws of each State.**"—As to when the High Court is bound by the decisions of the Supreme Courts of the States, see *Jud. Act*, sec. 79, p. 203, *supra*.

Evidence.

Rules of Court
for proof of
particular facts.
Cf. *Jud. Act*
1904, sec. 3.
Vic. No. 1696
sec. 3.

16. The Justices of the High Court or a majority of them may make rules of Court for regulating the means by which particular facts may be proved and the mode in which evidence thereof may be given.

Production of
books.
U.S. 722.

17. The High Court may in any suit order the parties to produce any books or writings (*a*) in their possession or power which contain evidence pertinent to any issue in the suit. If a plaintiff fails to comply with the order the Court may dismiss the suit; and if a defendant fails to comply with the order the Court may give judgment against him as by default.

(a) "**Production of books or writings.**"—This section is based upon sec. 724 United States Revised Statutes. It enacts that "in the trial of actions at law, the Courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in Chancery. If a plaintiff fails to comply with such order, the Court may, on motion, give the like judgment for the defendant as in cases of non-suit, and if a defendant fails to comply with such order, the Court may, on motion, give judgment

against him by default." Under this section the remedy has been limited to cases where issue is joined; *Jacques v. Collins*, 2 Blatchf., 23; Fed. Cas., No. 7167; *United States v. Hutton*, 25 Int. Rev. Rec., 37; Fed. Cas., No. 15,434. The power given includes the power to grant an inspection before trial with permission to take copies; *Exchange Nat. Bank v. Washita Cattle Co.*, 61 Fed. Rep., 190; *Lucker v. Phoenix Assur. Co.*, 67 Fed. Rep., 18; *Foster's Federal Practice*, p. 866. In requiring the production of books or writing in evidence, the Federal Courts are governed by this section, and not by the provisions of the State Statutes; *Gregory v. Chicago M. & St. P. R. Co.*, 10 Fed. Rep., 529. The applicant must show that the paper exists, that it is in the possession of the party, and that it is pertinent to the issue; *Triplett v. Bank of Wash.*, 3 Cranch. C.C., 646; *Jacques v. Collins*, 2 Blatchf., 23; Fed. Cas. No. 7167; *Isigi v. Brown*, 1 Curt., 401; Fed. Cas., 6993; *Bas. v. Steele*, 3 Wash., 381; Fed. Cas. No. 1038; and he must show the grounds of his belief upon the subject; *Caspary v. Carter*, 84 Fed. R., 416. The order may be absolute or conditional; *Dunham v. Riley*, 4 Wash., 126; *Isigi v. Brown*, *supra*. A motion made at the trial is too late; *Sampson v. Johnson*, 2 Cranch. C.C., 107; *Bank of U. S. v. Kurtz*, 2 Cranch. C.C., 342. Where motion is made before the trial the order must require the production of the books at the trial; *Merchant's Nat. Bank v. State Nat. Bank*, 3 Cliff., 201; Fed. Cas., No. 9,448. The word "require" does not include the power to compel compliance; *ib.*; as the penalty for failure to produce a paper is non-suit or default; *Isigi v. Brown*, *supra*; and a motion for *non-pros.* for failing to produce may be made even after the jury is sworn; *Waller v. Stewart*, 4 Cranch. C.C., 532; Fed. Cas. No. 17,109. A party cannot be compelled to produce a paper which would subject him to a penalty or forfeiture; *U. S. v. Nat. Lead Co.*, 75 Fed. Rep., 94. When a party inspects a paper produced by his adversary at his request, and then fails to offer it in evidence, his adversary may put it in evidence; *Edison El. Co. v. U. S. El. L. Co.*, 45 Fed. Rep., 55. For further authorities on this section, see *Desty's Federal Procedure*, § 244; *Foster's Federal Practice*, p. 865.

As to discovery and inspection under the Rules of Court, see Or. 26.

18. (1) The High Court may require and administer all necessary oaths (a). Oaths.
U. S. 72

(2) The forms of oath shall be the same, as nearly as may be, as those which are used in the Supreme Court of the State or part of the Commonwealth in which the oath is administered.

(3) Any person who by the law of the State or part of the Commonwealth in which an oath is to be administered is entitled to make an affirmation instead of taking an oath may do so in any cause or matter in the High Court, and shall do so in the form prescribed by that law.

(a) "Oaths."—As to administering of oaths by a person directed to take the examination of a person, see Or. 31, r. 11.

Orders and
commissions for
examination of
witnesses.

19. The High Court or a Justice may, in any suit or civil matter pending in the Court and at any stage of the proceedings, order the examination of any person upon oath orally or on interrogatories before the Court or a Justice or before any officer of the Court or other person, and at any place within the Commonwealth; or may order a commission to be issued to any person either within or beyond the Commonwealth authorizing him to take the testimony on oath of any person orally or on interrogatories; and may by the same or any subsequent order give any necessary directions touching the time place and manner of any such examination; and may empower any party to the suit or civil matter to give in evidence in the suit or matter the testimony so taken on such terms (if any) as the Court or Justice directs.

Orders and Commissions.—The following decisions have been given upon applications for orders to examine witnesses, and for the issue of commissions. Under a somewhat similar enactment, it was held in Victoria that “the issue of a commission is a matter within the discretion of the Court or Judge to whom the application is made; *De Saxe v. Schlesinger*, 7 V.L.R. (L.), 127. Ordinarily, where the application is made *bond fide*, and where no other means exist by which material evidence might have been or can be procured, the application is readily granted; *Bruce v. Ligar*, 6 W.W. & A.B. (E.), 240. But the grant of a commission under the Statute is not a matter of right, still less is it a matter of course”; *Merry v. The Queen*, 10 V.L.R. (E.), 143. As a general rule, where the plaintiff applies in a proper way and on proper materials, setting forth that there is a material witness to his case residing abroad, the Court or Judge will direct a commission for his examination to issue almost as a matter of course—there must be very strong reasons shown against it; *Rismondo v. Rismondo*, 12 V.L.R., 101. An application for a commission to examine material and necessary expert witnesses abroad is as readily granted as an application for a commission with respect to any other class of witnesses, provided that the commission is applied for *bond fide*, and not for the purpose of delay; *Acetylene Gas Co. v. Markicald*, 26 V.L.R., 607.

The application will not be granted on an affidavit merely stating that the witness is a material witness; *The Brush Electric Co. v. Parke*, 8 W.N. (N.S.W.), 54; see also *Cox v. Cox*, 10 W.N. (N.S.W.), 37; *McMahon v. Evans*, 8 W.N. (N.S.W.), 294; but the matters on which the witness will be examined, and the nature of his evidence should be placed before the Court; *Bleasby v. Romney*, 24 V.L.R., 201; *Kingston v. Reid*, (1902) Q.W.N. (Q.), 36.

On an application by a party to the action for a commission to take his evidence *de bene esse*, the affidavit in support should state the reasons necessitating his absence from the colony; *Michael v. Oldfield*, 8 A.L.T., 164. If there has been delay in applying it is incumbent on the applicant to make a special affidavit explaining the delay and showing that manifest injustice would be done if the application were refused; *Gibbs v. Clarke*, 8 A.L.T., 32. When material witnesses

are resident abroad, and their examination or cross-examination at the trial is not essential, the Court may, for the purpose of saving expense, order the issue of a commission; *The McKay Shoe Machinery Co. Ltd. v. Turner*, 16 W.N. (N.S.W.), 192. The application for a commission was granted: to examine witnesses in England, though the witnesses had been in Sydney and might have been examined *de bene esse*; *Mason v. Delargy*, 1 W.N. (N.S.W.), 68; where the person whom the defendants desired to examine on commission was a most important witness for the defence, and no other witness could serve as a substitute for him upon certain questions on which the defence mainly rested, and no means existed by which he could be compelled to come to Victoria and submit himself for examination there; *Merry v. The Queen*, 10 V.L.R. (E.), 135; on the application of a defendant for a commission to examine witnesses in France, the place of his birth, in support of a plea of infancy; *De Saze v. Shlesinger*, 7 V.L.R. (L.), 127.

An order was made where a witness whose evidence was essential to the plaintiff's case, but who was out of Victoria, refused to come to Victoria to give evidence, and the defendant charged such witness with fraud and collusion; *Tuckett v. Blake*, 10 A.L.T., 117. An order also was made on behalf of a plaintiff for the examination of an important witness on the day of his departure from the colony, the plaintiff paying the costs; *Forrest v. Eisert*, 2 A.L.T., 136.

A defendant was in the jurisdiction when a bill was filed, and he put in an answer and then left for England, after express notice that an application to take his evidence by commission would be opposed, it was held that he was not entitled to a commission to examine him in England as a witness on his own behalf; *Bruce v. Ligar*, 6 W.W. & A'B. (E.), 283. A commission was not granted while a discovery order was pending; *McQuade v. Herman*, 3 W.N. (N.S.W.), 102. A commission may be issued subject to conditions; *ib.*

The proper time to strike inadmissible evidence out of a commission is at the hearing, and not in Chambers before the hearing. The rules of practice on taking evidence under a commission are the same as those acted on in Court; *Bell v. Clarke*, 10 V.L.R. (E.), 292. Where evidence had been taken before a commissioner and objections not noticed by the commissioner were urged at the hearing, it was held such objections might be heard at the hearing; *Graham v. Graham*, 3 A.J.R., 55; see also *Baynes v. Osborne*, 4 S.C.R. (Q.), 12. Where an exhibit is after objection, appended to evidence taken on commission, the evidence can be put in without the exhibit; *In re Wilson*, 7 W.N. (N.S.W.), 116.

Copies of letters were put in before a commissioner, the original having been called for by notice to produce but not produced, and the notice itself was not put in or proved, it was held that the objection as to evidence was taken too late, and that it should have been taken before the Commissioner at the time; *Hatt v. Hatt*, 3 V.L.R. (E.), 227.

Certain deeds which were produced to, and proved, before the commissioners were not attached to the return, the plaintiff's counsel being unwilling to part with them, but what purported to be copies of them were so annexed, the originals being numbered and marked with the initial letters of the names of the commissioners. At the trial of the cause, deeds so numbered and marked were produced, and admitted in evidence, though there was no direct evidence that the deeds were those produced to the witnesses in England, or that the initials were

those of the commissioners, it was held that they were rightly admitted, though the correct course would have been for the commissioners to have annexed the originals to the return of the writ ; *White v. McDonald*, 11 S.C.R. (L.), N.S.W., 332.

It is the duty of a commissioner to use his own discretion as to the competency of witnesses examined by him, and to certify to the Court his opinion. Upon the return of a commission for the examination of a witness abroad, it appeared that witnesses were first examined as to his sanity, and the witness, an inmate of a lunatic asylum, was then tendered, but objected to as incompetent, and his examination on the *voir dire* desired. By consent he was examined, without prejudice to objections to his competency. Upon the hearing objections that the commission was not receivable, and that the lunatic was not a competent witness, and his evidence inadmissible, were over-ruled ; *White v. Hoddle*, 6 V.L.R. (E.), 82.

Where the order provided that signatures of witnesses should be attached, which was not done, it was held that such a provision was merely directory, and that the depositions having been put in evidence it was too late to raise the objection at the hearing ; the proper time for taking such an objection was when they were tendered ; *Hatt v. Hatt*, 3 V.L.R. (E.), 227 ; *White v. McDonald*, 11 S.C.R. (N.S.W.), 332.

Where the writ of commission directed that the return was to be closed up under the seals of the commissioners who acted, it was held that it applied to the external sealing of the packet, and that the evidence was not inadmissible, because the commissioners had not sealed the return to the writ ; *White v. McDonald*, 11 S.C.R. (L.), N.S.W., 332.

A deposition taken *de bene esse* cannot be read at the hearing of a suit if the deponent is in a fit condition to be examined orally. Where one party objected at the hearing to the reading of a deposition on the ground that the deponent was in a fit condition to be examined, and tendered evidence to that effect, time was allowed to the other side to rebut that evidence ; *Hubert v. Brown*, 9 W.N. (N.S.W.), 157.

If a plaintiff's witness, when being examined on commission, refuses to answer a lawful question on cross-examination by the defendant, the defendant may object to the plaintiff using at the hearing any portion of that witness's evidence. But if the defendant wishes to make use of the answer of the witness he must adjourn the matter direct to the Court to compel the witness to answer ; *Montgomery v. Macpherson*, 16 L.R., N.S.W. (E.), 81.

On the examination of witnesses under a commission where the plaintiff has closed his case, and the defendant has called some of his witnesses, the plaintiff will not be allowed, against the wish of the defendant, to recall any of his witnesses or call fresh witnesses ; *Bell v. Clarke*, 10 V.L.R. (E.), 283.

Where, on an enquiry before the Master as to next of kin, evidence had been taken under commissions, in support of the claims of certain persons, and another claimant coming in to prove subsequently thereto, sought to use such evidence in support of her claim also, it was held such evidence could only be used by consent of the other claimants ; *Attorney-General v. Huon*, 4 V.L.R. (E.), 216.

An appeal will lie from any order made by the Court or a Justice under this section ; *Jud. Act*, sec. 34. The power conferred by the section is discretionary.

"It is true that the Court retains a controlling power in all cases in which a Judge has a discretion vested in him by a Statute which does not declare his decision to be final. But the Court will not exert that power, and over-rule the Judge's discretion, merely because it does not agree with him in opinion as to the grounds on which his discretion has been exercised, unless there is no evidence to support his decision; *R. v. Hay*, 3 V.R. (L.), 160; or it appears that the Judge has been misled by false evidence, or that injustice will be done through the mistaken exercise of his discretion; *Beaufort v. Crawshaw*, L.R., 1 C.P., 699," *per* Higinbotham, J.; *Merry v. The Queen*, 10 V.L.R. (E.), 144. Appeal was allowed in this case on the ground that there was a mistaken exercise of his discretion by the Judge.

As to practice under this section, see *Daniell's Chanc. Prac.*, 7th ed., p. 543; *Chitty's Archbold*, 14th ed., p. 533. See also practice under Or. 31.

20. (1) On the hearing of any matter, not being the trial of a cause, evidence may be given by affidavit (a) or orally as the Court or Justice directs. Evidence by affidavit.

(2) At the trial of a cause, proof may be given by affidavit of the service of any document incidental to the proceedings in the cause, or of the signature of a party to the cause or his solicitor to any such document.

(3) The High Court or a Justice may at any time for sufficient reason order that any particular facts in issue (b) in a cause may be proved by affidavit at the trial, or that the affidavit of any person may be read (c) at the trial of a cause, on such conditions in either case as are just. But such an order shall not be made if any party to the cause desires in good faith that the proposed witness shall attend at the trial for cross-examination. English rules of 1883.
O. 37 R. 1.

(a) "**[Affidavit.]**"—Compare with this section E. Or. 37, r. 1. As to affidavits generally, see Or. 32; as to cross-examination of a deponent, see Or. 32, r. 1.

(b) "**Particular facts in issue.**"—Upon an inquiry as to damages for breach of a charter party evidence of witnesses in New South Wales was ordered to be given by affidavit; *Macdonald v. Antelme Patterson & Co.*, W.N. (1884), 72. Suits for the rectification of deeds, on the ground of mistake, will, as a rule, be heard only upon oral evidence; *Kelly v. Moore*, 19 W.N. (N.S.W.), 56.

(c) "**The affidavit of any person may be read.**"—At the trial of a cause with *viâ voce* evidence the Court admitted in evidence an affidavit filed upon an interlocutory motion; *Elias v. Griffith*, 46 L.J., Ch., 806. In a suit for revocation of probate on the grounds of undue execution and incapacity, where it appeared that every effort had been made to find one of the attesting witnesses, but without success, the Court allowed an affidavit made by him eight years before for the purpose of obtaining probate, to be admitted as evidence of execution and capacity; *Gornall v. Mason*, 12 P.D., 142. Where a witness could not attend at

the trial leave was given to use his affidavit; *Drewitt v. Drewitt*, 58 L.T., 684. The application for leave to read the affidavit should be made before the trial; *Drewitt v. Drewitt*, *ib.*

Evidence at trial to be given orally in open court, except certain cases.

21. Except as hereinbefore provided, or unless in any suit the parties agree to the contrary (a), testimony at the trial of causes shall be given orally in open court.

(a) "**The parties agree to the contrary.**"—The general rule is that at the trial of an action the evidence must be given orally, and in open Court. To this there are exceptions:—(1) Where the parties agree to the contrary; (2) or the Justice orders particular facts in issue to be proved by affidavit, or that the affidavit of any person be read; *High Court Procedure Act*, sec. 20; (3) or evidence is taken under the authority of sec. 19 of the *High Court Procedure Act*. It is probable that the Court would require "a formal written consent," and not one to be gathered from correspondence between the parties; *New Westminster Brewery Co. v. Hannah*, 1 C.D., 278.

UNREASONABLE REFUSAL.—If a party unreasonably and perversely refuses to give consent, it would appear that he may be ordered to pay the extra costs incurred by such refusal; *Patterson v. Wooler*, 2 C.D., 586. Such an agreement is equivalent to a consent to a trial before a Justice without a jury; *Brooke v. Wigg*, 8 C.D., 510. Unless the agreement specifies that the evidence is to be upon affidavit alone, the evidence of a witness on affidavit may be supplemented by *voir dire* evidence in Court; *Glossop v. Heston and Isleworth Local Board*, 47 L.J., Ch., 536; *Attorney-General v. Pagham &c. Co.*, W.N. (1876), 94.

AFFIDAVITS EXCLUDED.—Moreover, the Court itself, where the affidavits are unsatisfactory, or the interests of justice require it, may exclude the affidavits, and order the witnesses to be examined orally; *Lovell v. Wallis*, 53 L.J., Ch., 494; *Lawson v. Inare*, 32 S.J., 24. If after agreement either party finds himself unable to procure affidavit evidence either by reason of the reluctance of some of his witnesses to make affidavits, or other good cause, the Court, under its general jurisdiction to relieve from a slip or error in practice, may make an order granting relief from the agreement, and have the evidence taken wholly or partially *voir dire*; *Warner v. Moses*, 16 C.D., 100. Compare this section with (E) Order 37, r. 1.

As to "open Court," see *Jud. Act*, sec. 16, *supra*, p. 90.

Commissions for taking oaths.

22. The Chief Justice may issue commissions to persons within or beyond the Commonwealth authorizing them to administer oaths and take affirmations for the purposes of the High Court and proceedings therein.

"Fees."—As to fees payable to Commissioners, see Rules of Court, October 12th, 1903, r. 5.

Defects and Errors.

Amendment.

23. The High Court or a Justice may at any time, and on such terms as are just, amend any defect or error in any proceed-

ings in the Court; and all necessary amendments (a) shall be made for the purpose of determining the real questions in controversy or otherwise depending on the proceedings.

(a) "**All necessary amendments shall be made.**"—The general principles have been thus stated : "I know of no kind of error or mistake which if not fraudulent or intended to over-reach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, I do not regard such amendment as a matter of favour or of grace"; *per* Bowen, L.J., *Cropper v. Smith*, 26 C.D., 710. See also remarks, Lindley, L.J., *Indigo Co. v. Ogilvy*, (1891) 2 Ch., 39.

THE REAL CONTROVERSY.—An amendment ought to be allowed if thereby the real substantial controversy between the parties can be determined and multiplicity of legal proceedings avoided; *Jud. Act*, sec. 32. "The test as to whether the amendment should be allowed is whether or not the defendants can amend without placing the plaintiff in such a position that he cannot be recouped as it were, by any allowance of costs or otherwise"; *per* Pollock, B., *Steward v. North Metropolitan Tramways Co.*, 16 Q.B.D., 180; C.A., 556. See also, *Clarapede v. Commercial Union Association*, 32 W.R., 263; *Weldon v. Neal*, 19 Q.B.D., 396; *Australian Steam Navigation Co. v. Smith*, 14 App. Cas., 320.

TWO TESTS.—Two propositions are well established : First, that although it may be that the plaintiff was lax or forgetful in not putting his pleading in the form in which it should have been originally, if any harm arising from that can be compensated for by costs, there is no reason for not allowing him to repair the error; secondly, if owing to the mistake of the plaintiff, there has been such an injury to the defendant, or such a change in his position that he cannot get justice done, then such an amendment ought not to be allowed; *per* Jeune, B., *The Alert* (1895), 72 L.T., 124, following *Tildesley v. Harper*, (1878) 10 C.D. 393; *In re Gaulard & Gibbs' Patent*, 57 L.J. Ch., 209.

An amendment will be allowed unless the Court is satisfied that the applicant is acting *mala fide* or that his delay or blunder has done some injury to the other party which cannot be compensated by costs; *Sweetnam v. Jacobs*, 17 V.L.R., 501. The amendment which the Judge is required to make or allow must be one that will determine the real question which the parties have been agitating between themselves before the trial and had come to try. The Judge must exercise his discretion upon the materials before him in determining whether an amendment comes within this definition; *Dwyer v. O'Mullen*, 13 V.L.R., 933.

As to amendment generally, see Or. 24.

24. (1) No proceedings in the High Court shall be invalidated by any formal defect or by any irregularity (a), unless the Court is of opinion that substantial injustice has been caused thereby and that the injustice cannot be remedied by an order of the Court.

Formal defects to be amended.

(2) The Court or a Justice may make an order declaring that any proceeding is valid notwithstanding any such defect or irregularity.

(a) “**Irregularity.**”—Non-compliance with any rule of Court, or any rule of practice, not to render proceedings void, unless the Court or a Justice so directs; Or. 49, r. 5; as to applications to set proceedings aside for irregularity; see Or. 49, r. 6.

Change of Venue (a).

Change of
venue.

25. The High Court or a Justice may, at any stage of any suit pending in the Court, direct that the trial shall be had or continued at some particular place to be specified in the order, subject to such conditions (if any) as the Court or Justice imposes.

(a) “**Venue.**”—The plaintiff may, on the indorsement on his writ or statement of claim, name the place of trial, which place must be within the State in which the cause of action arose, and the action shall, unless the Court or a Justice otherwise orders, be tried in the place so named. When no place of trial is named, the place shall, unless the Court or a Justice otherwise orders, be the place in which the Registry from which the writ was issued is situated; Or. 30, r. 1.

PENAL ACTIONS.—In penal actions the Crown has not the prerogative of laying the venue where it pleases; see *Jud. Act, sec. 82, et seq.*; *Attorney-General v. Hamilton*, 10 W.N. (N.S.W.), 195.

CIVIL ACTIONS.—In civil actions the venue will not be changed from the place where the plaintiff has laid it, unless it be shown there will be a manifest preponderance of convenience in trying the cause elsewhere; *Jacob v. Bolding*, 11 S.C.R. (N.S.W.), 174; *Simson v. Guthrie*, 4 A.J.R., 76; or unless a great injustice will be done through the venue being left at place named by the plaintiff. A plaintiff, however, has no right to capriciously fix the venue where he likes, and so create manifest inconvenience to the other side; *Mahnke v. Schmidt*, 15 V.L.R., 364 (n).

BURDEN OF PROOF.—The Court will consider on whom the burden of proof lies, and will be directed in its decision by a desire to afford every convenience to the party on whom such burden lies; *Wilson v. Syme*, 6 V.L.R. (L.), 200.

BALANCE OF CONVENIENCE.—See the following cases as to balance of convenience; *Brown v. The Commissioners for Railways*, 3 W.N. (N.S.W.), 40; *Brewer v. Whittingham*, 1 W.N. (N.S.W.), 37; *Bourke v. Tindale*, 1 W.N. (N.S.W.), 38; *Commercial Bank v. Gibson*, 1 W.N. (N.S.W.), 24, 33; *Cooper v. Rutherford*, 4 W.N. (N.S.W.), 8. Change of venue will be ordered where there is a balance of convenience in regard to witnesses; *Wallace & Co. v. Lord Nelson & Co.*, 3 A.L.R. (C.N.), 73; *Du Moulin v. Du Moulin*, 18 N.S.W.L.R. (D.), 1; *Hayston v. Colonial Mutual Fire Ins. Co.*, Queensland Dig., col. 208; or where it appears likely to be advantageous that the Judge and jury should inspect the subject-matter of the action; *Wallace & Co. v. Lord Nelson & Co.*, 3 A.L.R. (C.N.), 73; *Budge v. Britten*, 19 W.N. (N.S.W.), 240.

FAIR TRIAL.—The venue of a case will not be changed unless there are sufficient facts to satisfy the Judge that a fair and impartial trial cannot be had at the original place of venue; *Macdonald v. Tully*, 1 Q.L.J. Suppt., 37. An application for change of venue on the ground of partiality of the jurors must be supported by allegations to that effect; *Hennessey v. Badgery*, 1 W.N. (N.S.W.), 34. Where the affidavits on an application to change the venue from Melbourne to the place where the cause of action arose, and the witnesses resided, established that the matter in dispute had been very freely discussed locally, and that the jurors would be very likely to have already come to an opinion one way or another about the case, the application was refused; *O'Brien v. Scott*, 6 A.L.R. (C.N.), 45.

COUNSEL'S FEES.—Where the venue is otherwise appropriate it should not be changed merely on the ground that counsel's fees would be greater in the country than if the case were tried at the metropolis; *Leversha v. Wrangham*, 15 V.L.R., 363.

LIBEL CASES.—An application for an order to change the venue from Sydney to Maitland was refused on the grounds that the plaintiff was a member of Parliament with public duties to perform in Sydney, and further that the libel being a very serious one the fullest publicity should be given to the case; *Griffith v. Johnson*, 19 W.N. (N.S.W.), 225. Change of venue of an action for libel was not ordered from Brisbane to a circuit town where the newspaper containing the libel was printed when the plaintiff alleged that the principal ground of complaint was in respect of the publication in Brisbane; *Lilley v. Parkinson*, 2 S.C.R. (Q.), 159. A resident of Melbourne brought an action for libel against a country newspaper in New South Wales, and the venue was laid in Sydney. An application by the defendant to change the venue to a place nearer the residence of the defendant and his witnesses was refused; *Tobin v. Grimshaw*, 1 W.N. (N.S.W.), 91.

DELAY.—A change of venue was refused where it involved delay of the trial; *Shanahan v. Cohen*, 1 W.N. (N.S.W.), 53.

MATERIALS.—On an application by the defendant for change of venue, the affidavit in support of the application should disclose—(1) the nature of his defence; (2) the number of witnesses proposed to be called; (3) the nature of the evidence they can give; *Beirne v. Pearse*, 15 W.N. (N.S.W.), 53. It is also necessary in applications by plaintiffs for a change of venue that the affidavits should disclose the nature of the evidence to be given by the witnesses proposed to be called; *Dillon v. Quinlan*, 16 W.N. (N.S.W.), 69.

See further as to practice generally, *Chitty's Archbold*, 14th ed., p. 589; *Chitty's King's Bench Forms*, 13th ed., p. 340.

Judgment and Execution.

26. Every person in whose favour a judgment of the High Court is given shall be entitled to the same remedies (a) for enforcing it by execution or otherwise—

Enforcement of judgments of the High Court.
U.S. 916.

- (a) Against the property of the person against whom it is given; and

(b) Subject to limitations which may be prescribed by any Rules of Court, against the person against whom it is given,

as are allowed, by the laws of the State in which such property is situated or such person is resident, as the case may be, to persons in whose favour a judgment of the Supreme Court of the State is given in like cases.

(a) "**Remedies.**"—This section is not an exact re-enactment of U.S. Revised Statutes, sec. 916. Under the United States section it is provided that "the party recovering a judgment in any Common Law cause in any circuit or district Court shall be entitled to similar remedies upon the same by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such Court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district Court; and such Courts may from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

STATE LAWS.—Under this section the construction placed upon the State laws by the highest Court of the State, while not binding on the Federal Courts, is entitled to great weight; *Sowles v. Witters*, 55 Fed. Rep., 159. The process on judgments is similar to that allowed in the State Courts; *U.S. v. Humphreys*, 3 Hughes, 241; Fed. Cas., No. 15,422. So a judgment creditor may have the same remedy against a municipal corporation as the State law allows against a private person; *New Orleans v. Morris*, 3 Woods, 115; Fed. Cas., No. 10,183.

ATTACHMENT.—So if the State law allows an attachment on the judgment, the same remedy is available in the Federal Courts; *Pearce v. Winter Iron Works*, 32 Ala., 68. The Congress adopted both the form and effect of executions as established by State laws; *Koning v. Bayard*, 2 Paine, 251; Fed. Cas., No. 7924; *Bank v. Halstead*, 10 Wheat., 51; *U.S. v. Graves*, 2 Brock, 379; Fed. Cas., No. 15,250.

SALE.—If the State law provides that a sale on execution discharges all liens, the purchaser under an execution issued by a Federal Court, obtains a good title; *Brown v. Bacon*, 27 Miss., 589. Execution cannot be levied on property if the State Law prohibits it; *Williams v. Benedict*, 8 How., 107.

LIEN.—In proceedings supplementary to execution, see *Ex parte Boyd*, 105 U.S., 647. As to lien of judgment of Federal Court, see *Desty's Federal Procedure*, vol. II., § 438; also, *Foster's Federal Practice*, § 380.

"By or against the Commonwealth or States."—There is no execution or attachment against the Commonwealth or States. As to mode of enforcing a judgment obtained against the Commonwealth or a State, see *Jud. Act*, secs. 65, 66. When the Commonwealth or a State obtains a favourable judgment it may be enforced by extent, or by the ordinary remedies allowed between subject and subject; *Jud. Act*, sec. 67.

27. When any claim is made to property taken in execution upon process issued out of the High Court, the Marshal or his Deputy may take in the Supreme Court of the State in which the property is situated the same proceedings by way of interpleader as if the process had been issued out of that Supreme Court; and that Supreme Court and the Judges thereof shall have jurisdiction to entertain and determine the matter.

28. A seizure or attachment (a) of property in execution upon process issued out of the High Court shall become inoperative when any event occurs by which, according to the laws of the State in which the property is situated, the seizure or attachment would become inoperative if made upon like process issued out of the Supreme Court of that State.

Discharge of
property taken
in execution
U.S. 933.

(a) "**Attachment.**"—Under the corresponding section it was held that an attachment was dissolved in Louisiana by an accepted cession of the attached property to creditors under the insolvency laws of that State; *Schwartz v. Claffin*, 13 U.S., App., 707; 60 Fed. Rep., 676.

Receivers and Managers.

29. When in any cause pending in the High Court a receiver or manager (a) appointed by the Court is in possession of any property (b), the receiver or manager shall manage and deal with the property according to the requirements of the laws of the State or part of the Commonwealth in which the property is situated, in the same manner in which the owner or possessor thereof would be bound to do if in possession thereof.

Duty of receiver
and manager.
U.S. A.D. 1888.
Ch. 506, s. 2.

(a) "**Receiver or Manager.**"—A receiver is an indifferent person between the parties, appointed by the Court to receive the rents and profits of real estate, or to get in and collect personal estate, or other things in question pending the suit, where it does not seem reasonable to the Court that either party should do so, or where a party is incompetent to do so, as in the case of an infant; *Daniell's Chanc. Prac.*, 7th ed., 1,409.

REALIZATION OF ASSETS.—To secure the proper realization of the property over which a receiver has been appointed, it may be necessary to confer upon the person appointed power to carry on a trade or business. In such a case a "manager," or as he is more commonly termed, "a receiver and a manager," is appointed. A receiver merely takes the income, and pays the necessary outgoings; a manager takes over and carries on the business. "The Court does not assume the management of a business or undertaking, except with a view to the winding up and sale of the business or undertaking. The management is an *ad interim* management, its necessity and justification spring out of the jurisdiction to liquidate and sell;

the business or undertaking is managed and continued in order that it may be sold as a going concern, and, with the sale, the management ends"; *Gardner v. London Chatham and Dover Ry. Co.*, L.R., 2 Ch., 212. See also *In re Manchester and Milford Railway Co.*, 14 C.D., 652, 653. In the United States both classes of officers are called receivers; *Foster's Federal Practice*, § 239.

(b) "**Property.**"—In what instances, and over what property a receiver may be appointed, see *Seton's Judgments and Orders*, 6th ed., vol. I., p. 781; *Daniell's Chanc. Prac.*, 7th ed., vol. II., 1409, 1424; *Amer. and Eng. Encyc. of Law*, ed. 1892, vol. 20, p. 78. As to decisions on the corresponding section in the United States, see *Desty's Federal Procedure*, § 230.

Applications for appointment of a receiver and manager may be made in Chambers; *Jud. Act*, sec. 16. As to practice with respect to appointment of receivers, see Or. 37.

30. A receiver or manager of any property appointed by the High Court may, without the previous leave of the Court (a), be sued in respect of any act or transaction (b) of his in carrying on the business connected with the property.

(a) "**Leave of the Court.**"—This section is based upon sec. 3 of the United States Acts 1887-1888 which reads that "every receiver or manager of any property appointed by any Court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the Court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the Court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." The section of the *High Court Procedure Act* does not follow the former practice of the Courts under which any person who considered himself prejudiced by having a receiver put in his way had to apply for an inquiry as to his interest or for leave to take the necessary proceedings; *Randfield v. Randfield*, 3 De G. F. & J., 766; *Angel v. Smith*, 9 Ves., 335; *Brooks v. Greathed*, 1 J. & W., 176, 178; *Searle v. Choat*, 25 C.D., 723; and he had to do that although his right to take possession was beyond question; *Anon*, 6 Ves., 287.

THE NEW RULE.—"The Act abrogates the old rule on the subject of suing receivers. It is no longer unlawful to sue a receiver appointed by a United States Court without leave of the Court appointing the receiver. The Court now has no discretion to say when its receiver may be sued. The Act gives the right without condition or qualification. It is a right not to be nullified, evaded, or abridged. No conditions can be imposed on its exercise. The Court must give effect to the Act. It has no discretion to do anything else"; *Central Trust Co. v. St. Louis, &c.* (1889), 40 Fed. Rep., 426.

The right to have the cause of action determined in the receivership suit is not abrogated by the Act, and a complainant who intervenes therein and asks for the determination of his claim thereby waives his right to bring an independent action; *Farrer v. Ferris* (1891), 145 U.S., 132; *Ray v. Pierce* (1897), 81 Fed. Rep. 881.

In the case of *Dillingham v. Anthony*, 37 Am. & Eng. R. Cas., 1, an action was brought in a Texan Court without leave against a receiver appointed by the

United States Circuit Court. The jurisdiction of the Court was denied on the ground that no Court other than the one appointing the receiver could exercise jurisdiction. This was overruled. The Court, *per* Stayton, C.J., said, "What-ever may be the true rule in suits brought against the receivers as to the necessity for leave to sue them in other Courts, under the Act of Congress receivers appointed by the Courts of the United States are subject to suit without leave in any Court having jurisdiction over the subject matter. No Court can interfere with the custody of property held by another Court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized even by the Court appointing the receiver, and not open to review by it, if the Court rendering the judgment had jurisdiction of the subject matter and the parties. The order in which a judgment so recovered shall be paid, and the adjustment of equities between the persons having claims on the property and effects in the hands of a receiver, must necessarily be under the control of the Court having custody through its receiver, but it does not affect the jurisdiction of other Courts conclusively to establish by judgment the existence and extent of the claim"; cited *Amer. and Eng. Encyc. of Law*, 1892 ed., vol. 20, p. 250.

It has been held by the United States Courts that an action against a receiver of a State corporation is not a case arising under the Constitution and laws of the United States simply by reason of the fact that such receiver was appointed by a Court of the United States, and that a receiver appointed by a federal Court may be sued in that Court as well as in the State Court; *Gableman v. Peoria &c. Ry. Co.*, (1900) 179 U.S., 335.

(b) "**Any act or transaction.**"—The Statute comprehends actions for torts committed by a receiver or by his employés, as well as suits *ex contractu*, but in every case the cause of action must be due to some act or transaction of his in administering the trust; *Texas &c. Ry. Co. v. Cox*, (1891) 145 U.S., 593; *McNulta v. Lochridge*, (1891) 141 U.S., 327; *The St. Nicholas*, (1891) 49 Fed. Rep., 671.

For further authorities, see *Denty's Federal Procedure*, § 231.

Actions by and against the Marshal.

31. (1) When the Marshal is a party to a cause in the High Court, all writs summonses orders warrants precepts process and commands in the cause which should in ordinary course be directed to him shall be directed to such disinterested person as the Court or a Justice appoints; and the person so appointed may execute and return them.

Action by or
against Marshal.
U.S. 922.

(2) When a deputy of the Marshal is a party to a cause in the High Court, any writs summonses orders precepts process and commands in the cause which should in ordinary course be directed to him shall be directed to such person as the Marshal appoints; and the person so appointed may execute and return them.

Rules of Court.

Rules of Court.
Schedule.

32. The Rules (a) in the Schedule to this Act shall, as to all matters to which they extend, regulate the proceedings in the High Court. But those Rules may be annulled or altered by the authority by which new Rules of Court may be made under this Act.

(a) "**Rules.**"—See *Jud. Act*, sec. 86, and Introduction, p. 49. Rules of Court are now subject to the *Rules Publication Act* 1903.

New Rules.

33. (1) The Justices of the High Court or a majority of them may make Rules of Court not inconsistent with this Act for carrying this Act into effect.

(2) The authority of the Justices of the High Court to make Rules of Court extends to making by way of re-enactment or otherwise any such Rules as are set forth in the Schedule to this Act with or without amendment.

To be laid before
the Parliament.

34. Every Rule of Court made in pursuance of the last preceding section shall be laid before both Houses of the Parliament within forty days next after it is made if the Parliament is then sitting, or if the Parliament is not then sitting then within forty days after the next meeting of the Parliament; and if an Address is presented to the Governor-General by either House of the Parliament within the next subsequent forty sitting days of that House praying that any such Rule may be annulled the Governor-General may thereupon annul it; and the Rule so annulled shall thenceforth become void and of no effect but without prejudice to the validity of any proceedings which have in the meantime been taken under it.

England.
Qd.
Va.

PART III.—APPEALS TO THE HIGH COURT.

Security.

Security.

35. (1) In any appeal to the High Court, security (a) shall not except under an order of the High Court be required to be given by a party appellant, except in the case of appeals from a judgment of the Supreme Court of a State or some other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council.

(2) In the case of such last-mentioned appeals, security shall be given by the party appellant in such manner as is prescribed by Rules of Court for the prosecution of the appeal without delay, and for the payment of all such costs as may be awarded by the High Court to the party respondent.

(3) The amount of security shall unless otherwise ordered by the High Court or a Justice be Fifty pounds.

(a) "**Security.**"—As to security in general, see Or. 25, r. 1, *et seq.*; as to security for costs, see Or. 25, r. 9, *et seq.*; as to security for costs of appeal from the Supreme Courts of a State, see Rules of Court, Part II., sec. iv., r. 10.

36. The High Court or a Justice may in any case reduce or increase the amount of security to be given by an appellant, and in the case of increase may order that unless the additional security is given within a time to be limited by the order the appeal shall be dismissed.

Amount of security.

Procedure.

37. Appeals to the High Court shall be instituted within such time and in such manner (a) as is prescribed by Rules of Court.

Institution of appeals.

(a) "**Time and manner.**"—As to time and manner of instituting appeals, see Rules of Court, Part II., *infra*.

38. When an appeal has been instituted, the High Court or a Justice or the Court or Judge appealed from may order a stay of all or any proceedings (a) under the judgment appealed from.

Stay of proceedings.

(a) "**Stay of . . . proceedings.**"—Where an unsuccessful party is exercising an unrestricted right to appeal, it is the duty of the Court, in ordinary cases, to make such order for staying proceedings under the judgment appealed from as will prevent the appeal, if successful, from being nugatory. But the Court will not interfere if the appeal appears not to be *bond fide*, or there are other sufficient exceptional circumstances; *Wilson v. Church*, 12 Ch. D., 454.

IRREPARABLE INJURY.—The Court will not stay the taking of accounts or inquiries pending an appeal unless it can be shown that irreparable injury will otherwise be caused; *per Fry, J., Hyam v. Terry*, 29 W.R., 32. Execution generally will not be stayed except on the ground of irreparable injury; *Chester v. Poicell*, 1 *Times Rep.*, 390. Stay of proceedings pending an appeal will not be ordered unless evidence be adduced to show that the respondent will be unable to repay the money ordered to be paid to him by the appellant, in the event of the respondent being unsuccessful on the appeal; *Hordern v. Smith*, 15 V.L.R., 512; *Paterson v. Clarton*, 7 A.L.T., 118.

BY WHOM ALLOWED.—The application for the stay of proceedings should be made to the Judge whose decision is appealed from ; *per Higinbotham, J., Monk v. Woods*, 7 A.L.T., 86.

For further authorities see *Chitty's Archbold*, 14th ed., 984 ; *Daniell's Chanc. Prac.*, 7th ed., vol. I., p. 1051.

PRACTICE.—As to general authority to stay proceedings at any time after the institution of any cause or matter, see Or. 38, r. 1 ; as to appeal from a Justice of the High Court, or from a Judge of the Supreme Court of a State exercising federal jurisdiction, or motion for a new trial not operating to stay proceedings unless so ordered ; see Rules of Court, Part II., sec. I., r. 25 ; sec. II., r. 1 ; as to stay of proceedings when an appeal is instituted from a Supreme Court of a State, *ib.*, sec. IV., r. 19.

Death of party
to an appeal.
U.S. 1875 s. 9.

39. (1) When either party to a judgment from which an appeal lies to the High Court dies before the time allowed for instituting an appeal has expired, it shall not be necessary to revive the cause or matter by any formal proceedings.

(2) If the personal representative of the deceased party desires to appeal, he may file in the Court in which the cause or matter is pending a duly certified copy of the instrument by which he is appointed, and thereupon may institute an appeal in the same manner as the party whom he represents might have done.

(3) In the case of the death of the party in whose favour the judgment is given or made, notice of appeal may be given to his personal representative or, if there is no such representative, to such person as the High Court or a Justice directs.

Sec. 32.

THE SCHEDULE.

RULES OF COURT (a).

PART I.—ORIGINAL JURISDICTION.

- I.—Commencement of Civil Proceedings.
- II.—Parties to Actions.
- III.—Partial Relief.
- IV.—Writs of Summons.
- V.—Concurrent Writs.
- VI.—Renewal of Writs : Lost Writs.
- VII.—Service of Originating Proceedings.

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- VIII.—Service out of the Jurisdiction.
IX.—Appearance.
X.—Default of Appearance.
XI.—Change of Parties.
XII.—Summons for Directions.
XIII.—Trial without Pleadings.
XIV.—Pleading generally.
XV.—Particulars.
XVI.—Statement of Claim.
XVII.—Defence.
XVIII.—Payment into Court.
XIX.—Reply and Subsequent Pleadings.
XX.—Matters Arising Pending the Action.
XXI.—Demurrer.
XXII.—Discontinuance, &c..
XXIII.—Default of Pleading.
XXIV.—Amendment.
XXV.—Security.
XXVI.—Discovery and Inspection.
XXVII.—Admissions.
XXVIII.—Issues, Inquiries, and Accounts.
XXIX.—Questions of Law and Issues without Pleadings.
XXX.—Trial.
XXXI.—Evidence.
XXXII.—Affidavits.
XXXIII.—Motion for Judgment.
XXXIV.—Relief against Judgments and Orders.
XXXV.—Attachment and Committal.
XXXVI.—Actions by and against Firms and Persons carrying on
Business in Names other than their own.
XXXVII.—Inspection of Property : Interim Preservation, Custody,
and Management of Property : Receivers : Stop
Orders.
XXXVIII.—Staying Proceedings.
XXXIX.—Consolidation.
XL.—Chambers.
XLI.—Certiorari : Mandamus : Prohibition : Quo Warranto :
Writ of Assistance.
XLII.—Habeas Corpus.
XLIII.—Committal for Contempt of Court.
XLIV.—The Marshal and other Officers charged with Service and
Execution of Process.

- XLV.—Time.
- XLVI.—Costs.
- XLVII.—Service.
- XLVIII.—Sittings and Vacations.
- XLIX.—General Provisions.

PART II.—APPELLATE JURISDICTION.

Appeal Rules.

- I.—Appeals from Justices of the High Court and New Trials.
- II.—Appeals from Judges of the Supreme Courts of the States in the Exercise of Federal Jurisdiction : New Trials.
- III.—Appeals from Decisions of Inferior Courts in the Exercise of Federal Jurisdiction.
- IV.—Appeals from Supreme Courts of States.

(a) **“Rules of Court.”**—As to the power of the High Court to make Rules of Court, see *Jud. Act*, secs. 86, 87 ; H.C.P. Act, secs. 16, 32, 33 ; see also Introduction, p. 49, *supra* ; in cases not provided for by Rules the Justice may give directions ; Or. 49, r. 7. “The decision of the English Court (on a Rule of Court) is not binding upon this Court, but, in accordance with our practice, in the analogous case of a decision of a Court of Appeal in England upon the terms of an English Act of Parliament, identical with those of a Victorian Act of Parliament, we adopt and follow it” ; per Higinbotham, C.J., *In re Annand*, 17 V.L.R., 108. Rules of Court can be moulded to meet the equity of the case, but not so as to give relief from anything required to be performed under a Statute : *Re Fitzgerald*, 1 Q.L.J., 13 ; *Re Rook*, *ib.*, 47.

PART I.—ORIGINAL JURISDICTION.

ORDER I.

COMMENCEMENT OF CIVIL PROCEEDINGS.

Mode of
commencement.

Cl., E. Or. 1, r. 1.

E. Or. 2, r. 1.

1. Causes and matters in the High Court may be commenced by writ of summons, motion, originating summons, or order to show cause.

Causes and matters which are by any Act or Rules of Court required or authorized to be commenced by motion, whether on notice or *ex parte*, or by originating summons, or order to show cause, or in any other specified manner, shall or may, respectively, be so commenced.

When by any Act or Rules of Court any person is authorized to make any application to the Court or a Justice with respect to any

matter which is not already the subject-matter of a pending cause or matter, and no other mode of making the application is prescribed by the Act or Rules, the application, if made to the Court, shall be made by motion, and, if made to a Justice, shall be made by originating summons.

Except as aforesaid, and except as otherwise provided by any Act, all causes in the Court shall be commenced by writ of summons.

Causes commenced by writ of summons are called actions.

The document by which a cause or matter is commenced is called an "originating proceeding."

For definition of "cause" and "matter," see *Jud. Act*, sec. 2. As to writs of summons, see Or. 4, *et seq.*

Application for writs of *certiorari*, *mandamus*, or prohibition, for leave to exhibit informations of *quo warranto*, or for relief of like nature, to *mandamus* or *quo warranto*, are made on order calling on the parties interested to show cause; Or. 41, r. 1, *et seq.*

2. Every proceeding in the Court shall be entitled "In the High Court of Australia." If the cause is pending in a District Registry, the word "Registry" shall be added with the name of the State prefixed, and, if there is more than one District Registry in the State, the name of the place at which the Registry is situated shall also be added.

Titles of proceedings.
Cf., E. Or. 2, r. 1.

As to entitling of affidavits see Or. 32, r. 2; of proceedings on applications for *certiorari*, *mandamus*, or prohibition, or for leave to exhibit information of *quo warranto*; Or. 41, rr. 3, 4; as to title of action, see Appendix, Form No. 1; as to actions for condemnation of property, or recovery of any penalty, or forfeiture, to be in the name of the King; Or. 4, r. 4.

3. The solicitor of a party suing by a solicitor shall indorse upon the originating proceeding, and upon every notice in lieu of service of an originating proceeding, the address of the plaintiff, and also his own name or firm and place of business, and also, if his place of business is more than one mile from the Registry in which the cause or matter is commenced, a place to be called his address for service, which shall not be more than one mile from the Registry, where any proceedings in the cause or matter may be left for him. And, if the solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.

Address of suitor and of his solicitor to be indorsed on originating proceeding.
Address for service.
Name of principal and agent.
Cf., E. Or. 4, r. 1.

4. A party suing in person shall indorse upon the originating proceeding, and upon every notice in lieu of service of an originating proceeding, his place of residence and occupation, and also, if his place

Party suing in person to indorse address for service.
Cf. E. Or. 4, r. 2.

of residence is more than one mile from the Registry in which the cause or matter is commenced, another proper place to be called his address for service, which shall not be more than one mile from the Registry, where any proceedings in the cause or matter may be left for him.

As to indorsement of address for service by solicitor of party suing, see r. 3, *supra*. An omission to set out the plaintiff's place of residence may be amended, being a mere irregularity; *Noall v. Billing*, 18 V.L.R., 576.

ORDER II.

PARTIES TO ACTION.

1. Generally.

Persons claiming jointly severally or in the alternative may be plaintiffs.
Cf., E. Or. 16,
r. 1.

1. All persons in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, may be joined in an action as plaintiffs, provided that the case is such that if such persons brought separate actions some common question of law or fact would arise.

Provided that the Court or a Justice may, in any case in which separate and distinct questions arise, order that separate pleadings be delivered, or separate trials had, or may make such other order as is just.

When several plaintiffs are joined in an action, judgment may be given for such of them as are entitled to relief for such relief as they are entitled to, without any amendment. But the defendant shall be entitled to his costs occasioned by joining as a plaintiff any person who is not entitled to relief, unless the Court or a Justice in disposing of the costs otherwise directs.

As to adding and striking out parties, see rr. 2, 9, 10; as to change of parties by death or otherwise, see Or. 11; as to actions by and against firms and persons carrying on business in names other than their own, see Or. 36; as to costs generally, see Or. 46; *Jud. Act*, secs. 26, 27.

Two equitable mortgagees of the same property may join as plaintiffs in one action for foreclosure; *McMillan v. Wood*, 2 A.L.R., 19.

Action in name of wrong plaintiff.
Cf., E. Or. 16,
r. 2.

2. When an action has been commenced in the name of the wrong person as plaintiff, or it is doubtful whether an action has been commenced in the name of the right plaintiff, the Court or a Justice may order that any other person be substituted or added as plaintiff upon such terms as are just.

The name of the manager of a bank was substituted as plaintiff, for that of bank, it being discovered, after action commenced, that the legal estate was vested in the manager as trustee for the bank; *Bank of Victoria v. M'Lay*, 6 A.L.T., 27. Where a plaintiff is not entitled to bring an action in his own name, he will not be entitled under Vic. Or. 16, rr. 2, 11 (cf., rr. 2, 9), to add as a plaintiff a party who has the right to sue; *Young v. Turner*, 14 A.L.T., 89. It would appear that a plaintiff has no right to sue under an assumed designation; *The Trent Brewery v. Lehane*, 21 V.L.R., 283.

A plaintiff, a Chinaman, who brought an action in his business name, was allowed to amend the writ by substituting his real name; *Ye Sing v. Lion Insurance Co.*, 1 W.N. (N.S.W.), 61.

3. When any person has been improperly or unnecessarily joined as a plaintiff in an action, the defendant shall be entitled to the same relief by way of cross-claim or set-off against the other plaintiffs or any of them, as if that person had not been so joined, notwithstanding such misjoinder or any proceeding consequent thereon.

Cross-claim :
misjoinder.
Cf., E. Or. 16,
r. 3.

As to cross-actions, see Or. 13, r. 5; Or. 14, r. 3; Or. 17, r. 9.

4. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such of the defendants as are found to be liable, according to their respective liabilities, without any amendment.

Persons to be
joined as
defendants.
E. Or. 16, r. 4.

As to striking out a defendant, see rr. 9, 10, *infra*.

As to signing judgment against one or more defendants in default of appearance, see Or. 10; and in default of pleading, see Or. 23. As to joining defendants under their firm names, see Or. 36.

Only those persons can be joined as defendants who are in some way liable on the same cause of action. This order deals merely with joinder of parties and not with joinder of causes of action. There must be identity of subject matter in which case this order gives ample liberty in the choice of parties; *Montgomerie's Brewery Co. v. Blyth* (No. 2), 26 V.L.R., 34. Compare also, *Gray v. L. Stevenson & Son Ltd.*, 25 V.L.R., 476.

In an action against directors of a building society for improper payments out of the funds of the society to themselves or others, no persons can be joined as defendants who are not alleged to be liable jointly, severally, or in the alternative in respect of all the payments alleged to have been made; *Britter v. Sprigg*, 26 V.L.R., 65.

Where a plaintiff is uncertain whether property is held by a defendant personally or as trustee, he can allege the facts and claim recovery of possession against the defendant personally or as trustee. A plaintiff on one set of facts may seek relief either jointly or severally against two defendants. Where the cause of action is the same against several defendants, except as to one matter arising substantially out of the same set of facts upon which the cause of action is based, such separate claim may be allowed to stand under Vic. Or. 16, r. 5 (cf. r. 5, *infra*) if no inconvenience is caused thereby; *Roberts v. Graham*, 24 A.L.T., 99.

Two defendants were sued in respect of the same tort in the one action. Plaintiff claimed damages from each for personal injuries sustained by falling over a heap of stones. The statement of claim alleged that the defendant corporation had the care of the street upon which the accident happened, and that the defendant Board of Works improperly broke up and left stones on the said street. *Held* that the statement of claim could properly claim damages from each defendant in the same action; *Mendoza v. The Mayor &c. of Melbourne and Melbourne and Metropolitan Board of Works*, 22 V.L.R., 611.

Parties who were made defendants to an action on an alleged fraudulent preference were merely sureties for the parties alleged to be preferred, there being no suggestion in the statement of claim that they were parties to the alleged preference, it was held that they should not have been so joined; *Normanby Copper M. Co. Ltd. v. Corfield*, 5 S.C.R. (Q.), 113.

In an action by the assignee against an insolvent and his wife to have the wife declared a trustee, the husband should not be joined; *Sheppard v. Penglae*, 18 V.L.R., 180.

Defendant need not be interested in all the relief claimed.

E. Or. 16, r. 5.

5. It shall not be necessary that every defendant shall be interested as to all the relief claimed in the action, or as to every cause of action included in the action; but the Court or a Justice may make such order as is just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he has no interest.

Joinder of persons severally or jointly and severally liable.

E. Or. 16, r. 6.

6. The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes.

Plaintiff in doubt as to person from whom redress is to be sought.

E. Or. 16, r. 7.

7. When a plaintiff is in doubt as to the person from whom he is entitled to relief, he may join two or more persons as defendants, to the intent that the questions as to which, if any, of the defendants is liable, and as to what relief the plaintiff is entitled to, may be determined as between all parties.

See *Roberts v. Graham*, note to rule 4, *supra*.

Numerous persons.

Cl., E. Or. 16, r. 9.

8. When there are numerous persons having the same interest in the subject-matter of a cause or matter, one or more of such persons may sue, and the Court or a Justice may authorize one or more of such persons to be sued, or may direct that one or more of such persons shall defend, in such cause or matter, on behalf or for the benefit of all persons so interested.

NUMEROUS PERSONS.—Where a plaintiff in an action has signed judgment for default in pleading against a defendant authorised to defend on behalf of and for the benefit of all persons interested, the plaintiff is entitled to judgment. On an application by a third person to set aside such judgment upon

facts raising a meritorious defence, the Court ought to exercise its discretion by allowing him to defend the action, but the costs of the application and the costs of the plaintiff rendered useless by the application should be paid by the applicant; *Brown v. Fraser*, 22 V.L.R., 337. As to order made authorising defendants to defend; see *Wyburn v. Corporation of Canterbury*, 19 V.L.R., 302; *The Eighth Union Building Society v. Carnegie*, *ib.*, 388. *Quære*, whether an infant may be authorised to defend as a representative party; *In re Will of Crump*, 3 A.L.R., 179. A person in a representative position who would ordinarily be the proper person to sue cannot do so when his own acts and conduct are impeached; *Coane v. Gill*, 3 Q.L.J., 15. This rule does not apply where one of several defendants cannot be served by reason of his absence in parts unknown; *Allen v. Allen*, (1902), S.R. (Q.), 306.

9. The Court shall not refuse to determine a cause or matter by reason only of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Misjoinder and nonjoinder :

The Court or a Justice may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as appear to the Court or Justice to be just, order that the names of any persons improperly joined, whether as plaintiffs or as defendants, be struck out, or that the names of any persons who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added, either as plaintiffs or defendants.

Striking out and adding parties. Cf., E. Or. 16, r. 11.

But no person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing.

Consent of plaintiff or next friend.

As to the time for application to add or strike out a party, see r. 10 (*infra*); as to service of proceedings on new parties, see r. 11 (*infra*). As to power of Court to hear and determine a suit in the absence of parties, see *Jud. Act*, sec. 28.

ABSENT PARTY.—As to absent party out of the jurisdiction not being bound by a decree in a suit, see *Bennett v. Morris*, 14 V.L.R., 9.

NON-JOINDER OF PARTIES.—Where an objection for want of parties was pleaded in the defence, and the Court thought it could not do substantial justice between the parties unless the absent party were before it, it put the plaintiff to elect whether she would proceed with the case at her risk or would accept an adjournment in order to add parties on paying costs; *Williams v. Sandy*, 13 V.L.R., 368. As to a decree made in the absence of necessary parties, and on an amendment made on appeal adding them, a new trial being ordered, see *Rigg v. Standard Bank*, 22 V.L.R., 419. After the arguments on appeal were heard, and just before judgment was given by the Full Court, these parties appeared by counsel and consented to be bound by the judgment and any order the Court might see fit to make. *Held* such consent could not get over the want of parties;

ib. Where, by a principle of equity, a suit would be regarded as abortive unless certain persons were parties, the rules cannot do away with the necessity of such persons being parties; *Falkingham v. Harbison*, 24 V.L.R., 764.

NECESSARY PARTIES.—The following were held necessary parties :—The tenant for life in an action brought by a remainderman against trustees for breach of trust in handing over part of the *corpus* to the tenant for life and for improper investments of other portions of the property; *Tipping v. Richelieu*, 18 V.L.R., 772: the registered owner of shares in a no-liability company in an action by a purchaser from him to have an alleged forfeiture declared void; *Dalrymple v. Prince of Wales &c. Co.*, 20 V.L.R., 516; compare also, *Gray v. L. Stevenson & Son Ltd.*, 25 V.L.R., 476; the assignee of a defendant where the defendant has become insolvent after the date of a conditional foreclosure order; *Bromfield v. Cramer*, 1 A.L.R., 152; all persons interested, on the demand of the trustees, where a claim is brought by a beneficiary against trustees and accounts are claimed; *Swan v. Perpetual Executors*, 3 A.L.R., 188; the Crown, when interested in fees payable by a party in connection with the subject matter of the action; *Thiessen v. Lambert*, 25 V.L.R., 368; persons whose interests are to be affected by the litigation; *McDonald v. Tully*, 2 S.C.R. (Q.), 110; a person entitled under the circumstances to an interest in land purchased and which land was the subject matter of an action to enforce a legal execution of a mortgage and, in default of payment, for foreclosure or sale; *Corbett v. Sullivan*, 19 A.L.T., 177; the real purchaser of shares in an action for calls against one of his clerks where the defendant pleaded infancy and stated in answer to interrogatories who the real purchaser was, and that the shares were transferred into his, the defendant's name; *Munro v. O'Hanlon*, 15 V.L.R., 300.

Where beneficiaries wish to recover in respect of a breach of trust by two or more trustees, the cause of action is severable, and they may bring an action against one or more of them without making the others parties; but if, with the claim in respect of a breach of trust, there is claimed a general account, all the trustees or their representatives are necessary parties; *Falkingham v. Harbison*, 24 V.L.R., 764.

The mere fact that it would be necessary, in order to enable the plaintiff to obtain complete relief under a declaration sought by him, that defendants additional to those joined should be before the Court, does not constitute a valid objection for want of parties. In an action for a declaration that an assignment by beneficiaries, by way of family arrangement, of shares under a will is not binding on the plaintiff, one of the assignors, the plaintiff's co-assignors are proper parties, as well as the assignee; *Credginton v. Sandhurst &c. Trustees Co.*, 8 A.L.R., 180.

The Minister of Justice was held not to be a proper party in an action to set aside a forfeiture of a gold mining lease, and to recover possession; *Kirkbride v. Minister of Justice and the New Day Dawn F. G. M. Co. Ltd.*, 3 Q.L.J., 163. An assignee, under an assignment by the Curator of a felon's estate, was held not to be a necessary party in a suit impeaching the assignment; *Mitchell v. McDougall*, 11 V.L.R., 487.

STRIKING OUT A PARTY.—Where it is sought to strike out the name of a plaintiff, and to have him joined as a defendant, he must be served with notice of the application; *Sinclair v. Naylor*, 15 V.L.R., 7.

ADDING A PARTY. — The Court has power in actions of tort, as well as of contract, to add as defendants all persons who ought to be joined ; *Taffs v. Beesley*, 20 V.L.R., 220. A joint contractor, who is a defendant, has a right to have his co-contractor made a defendant ; *Greig v. Hutchinson*, 11 A.L.T., 53 ; but a defendant cannot have a joint tortfeasor added as co-defendant ; *Muir v. Shunn*, 3 Q.L.J., 164. A person may be appointed to represent the interest of a deceased person, who was not, before his death, a party to the suit ; *Patrick v. Mumby*, 24 V.L.R., 448. As to restoration of the name of a trustee in insolvency to the record, in order to vacate a judgment, see *Sparks v. Harper & Co.*, 4 Q.L.J., 38.

CONSENT OF PLAINTIFF. — Where a shareholder, without having previously obtained the consent of the company, brings an action in which he joins the company as a co-plaintiff, the Court may, on the application of the company, order its name to be struck out. It may, however, adjourn, on conditions, the application to give an opportunity to the plaintiff to obtain, if possible, its sanction to its name being used ; *White v. Shaw*, 21 V.L.R., 559. On an application by a defendant to remove the name of one of several plaintiffs from the writ, upon the ground that he had been joined without his authority, it should be shown that the plaintiff in question is unwilling to remain a plaintiff, and acquiesces in the application ; *Cayron v. Russell*, 23 V.L.R., 399.

10. An application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a Justice, at any time before the hearing of the cause, or may be made at the hearing in a summary manner.

Application to strike out.
Cf., E. Or. 16, r. 12.

As to adding or striking out parties, see rr. 2, 9.

It is not the duty of the defendant who takes an objection for want of parties to have them added ; he may take the objection by his defence, and argue it at the trial, and if successful he is entitled against the plaintiff to costs of and occasioned by an adjournment to add them as parties ; *Falkingham v. Harbison*, 24 V.L.R., 764. In an action by the holder of a document purporting to be a debenture transferable by delivery against the persons whose names appeared on the face of it as president, vice-president, treasurer and secretary of the unincorporated society which issued it, an objection by the defendant that all the members of the society should be made defendants will not be entertained at the trial ; *Smith v. Auchterlonie*, 23 V.L.R., 16. The Court will hear any objection for want of parties appearing on the face of the pleadings before the case is entered upon ; but if it depend upon the evidence, the Court will hear the case before determining it ; *Williams v. Sandy*, 13 V.L.R., 368. Where an objection is taken at the last moment the party raising it should be mulcted in costs ; *Tipping v. Richelieu*, 16 V.L.R., 772.

11. When a defendant is added or substituted, he shall, unless he waives such service, be served with the amended originating proceeding, or with notice in lieu of service, as the case may be, and the proceedings as against him shall, unless otherwise ordered, be deemed to have begun only on such service being effected.

When defendant added.
Cf., E. Or. 16, r. 13.

Cf. E. Or. 16,
r. 11.

Such service shall, unless otherwise ordered by the Court or a Justice, be effected in the same manner in which original defendants are served.

As to service, see Or. 7, Or. 47.

2. Persons under Disability.

Infants.

Cf., E. Or. 16,
r. 16.

12. An infant may sue or carry on the proceedings in any cause or matter by his next friend, and may appear in any cause or matter by his guardian *ad litem*.

As to removal and appointment of guardian *ad litem*, see rr. 15, 16, *infra*. As to service of originating proceeding on infant, Or. 7, r. 4. As to appearance by persons under disability, Or. 9., r. 13 *et seq.* As to costs of solicitor guardian *ad litem*, Or. 46, r. 4. As to staying proceedings improperly instituted in the name of any person by a next friend, see Or. 38, r. 3.

The next friend of an infant is liable to the defendants for costs of the action if the defendant succeeds; *Flannagan v. Flannagan*, 6 V.L.R. (E.), 77. Where an action was brought by an infant without naming a next friend, the action was dismissed with costs against the plaintiff's solicitor personally; *Starkey v. Stewart*, 8 Q.L.J. (N.C.), 11. If the plaintiff in such an action ratifies the proceedings when he comes of age the action will not be dismissed on the ground that it was begun in the name of an infant without a next friend; *Sartori v. McLeod*, 22 V.L.R., 493. On motion to appoint a guardian of an infant's person the infant can only appear by a guardian *ad litem*. Where the objection was taken at the hearing of the motion the Court made the appointment of guardian *ad litem*, *instantly*; *In re Pennington*, 1 V.L.R. (E.), 97.

The Court will not as a rule approve, on behalf of an infant defendant, a compromise unless there is evidence that the guardian *ad litem* of such infant has gone carefully into the matter and is satisfied that such compromise is for the benefit of the infant; *In re Montgomery*, 18 W.N. (N.S.W.), 160. Security of costs may be ordered to be given by the next friend where he is resident out of the jurisdiction; *In re Krokstedt*, 16 L.R. (B.), N.S.W., 106. As to attachment of next friend for non-payment of costs, see *Radford v. Kavanagh*, 15 W.N. (N.S.W.), 226.

Compare the practice in New South Wales, *Rich, Newham and Harvey, Practice in Equity*, pp. 104, 105.

Married women.

Cf., E. Or. 16,
r. 16.

13. A married woman may sue or defend in her own name, being described as the wife of her husband, naming him.

Lunatics.

14. A person found or declared to be of unsound mind may sue or defend by the committee of his person or estate, as the case may be.

Persons of
unsound mind
without
committees.

Cf., E. Or. 16,
r. 17.

A person who is of unsound mind, but has not been so found or declared, and a person so declared, but of whom a committee of his person or estate, as the case may be, has not been appointed, may sue by his next friend, and may defend or intervene by a guardian appointed by a Justice for that purpose.

As to service of writ on lunatic, see Or. 7, r. 5; as to stay of proceedings improperly instituted in the name of any person by his next friend, see Or. 38, r. 3.

15. Before the name of any person is used in any cause or matter as next friend of any infant or other party, such person shall sign a written authority to the solicitor for that purpose, and the authority shall be filed in the Registry with the originating proceeding. The authority shall not extend to any other proceeding than that specified in it.

Next friend.
Cf., E. Or. 16,
r. 20.

A married woman or a corporation cannot be a next friend or a guardian for the purpose of bringing or defending an action.

As to proceedings by or against infants or married women, see rr. 12, 13, *supra*; as to stay of proceedings improperly instituted by a next friend, see Or. 38, r. 3. The written authority is intended for the protection of the next friend; the omission to file it cannot be taken advantage of by the defendant; *Mahood v. Odell*, 2 W. & W. (E.), 73. Where infant defendants are of years of discretion, their consent should be obtained to the appointment of guardian *ad litem*; *M'Vean v. M'Vean*, 7 V.L.R. (E.), 156.

The fee payable on filing a written authority to use a person's name as next friend is 2s. 6d.; Rules of Court, October 6th, 1903.

16. The Court or a Justice may, for sufficient cause shown, remove a next friend or guardian *ad litem*.

Removal and
appointment of
next friend and
guardian *ad
litem*.
Cf., Q. Or. 3,
r. 18.

Whenever for any reason there is no next friend or guardian *ad litem* of an infant, the Court or a Justice may appoint a fit person, with his own consent, to be such next friend or guardian.

As to actions by and against infants, see r. 12, *supra*.

17. If* any cause or matter to which any infant or person of unsound mind, whether so found or declared or not, or a person under any other disability, is a party, any consent as to the mode of taking evidence or as to any other procedure shall, if given with the sanction of the Court or Justice by the next friend, guardian, committee, or other person acting on behalf of the person under disability, have the same force and effect as if the party were under no disability and had given the consent.

Consent of
persons under
disability to
procedure.
Cf., E. Or. 16,
r. 21.

* This should be "In," see Q. Or. 3, r. 19.

ORDER III.

PARTIAL RELIEF.

1. An action shall not be open to objection on the ground that a merely declaratory judgment or order is sought thereby; and the Court may make binding declarations of right in an action properly

Declaratory
judgments and
orders.
E. Or. 25, r. 5.

brought, whether any consequential relief is or could be claimed therein or not.

As to the effect of such a rule, see *Gemmell v. Gemmell*, 18 V.L.R., 382. See also *Rich, Newman and Harvey, Practice in Equity* (N.S.W.), pp. 9, 10.

ORDER IV.

WRITS OF SUMMONS.

Action to be commenced by writ.
Cf., E. Or. 2, r. 1.
Cf., E. Or. 3, r. 2.

1. Every action shall be commenced by a writ of summons, which shall have indorsed thereon a concise statement of the nature of the claim made, or of the relief or remedy sought in the action.

The jurisdiction of the High Court extends over the whole Commonwealth. Writs of summons for the commencement of actions in the High Court may be issued either in the Principal Registry, or in any District Registry, subject to the conditions of sec. 6 *High Court Procedure Act*. A writ issued in any Registry may be served anywhere within the Commonwealth; *Jud. Act*, sec. 25.

As to form of writ, see r. 6, *infra*; and for general form, see Appendix, Form No. 1; as to statement on writ when issued from Registry of State in which the defendant does not reside or carry on business, see r. 7, *infra*; as to sealing writ, see H.C.P. Act, sec. 4; as to date of writ, *ib.*, see sec. 5; as to indorsement of place of trial, see Or. 30, r. 1; as to the commencement of other causes and matters, see Or. 1, r. 1; as to amendment of writ, see r. 2, *infra*; as to duration of writ, see Or. 6, r. 1; as to concurrent writs, see Or. 5, r. 12; as to renewal of writs, see Or. 6, rr. 1, 2; as to loss of writ, *ib.*, r. 3; as to service of writ, see Or. 7, Or. 8; as to service on Commonwealth or a State, see *Jud. Act*, sec. 63; as to appearance to writ, see Or. 9; as to issue of writ, see Or. 49, r. 3; as to leaving copy on issue of writ, see r. 11, *infra*. Where the writ is for service without the jurisdiction, the indorsement of the claim must show that the subject matter is within the provisions of Or. 8.

The fee payable on sealing a writ of summons for commencement of an action is 10s.; Rule of Court, October 6th, 1903.

Amendment allowed.
Cf., E. Or. 3, r. 2.

2. The indorsement required by the last preceding rule shall not be invalid by reason of failure to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled.

The plaintiff may, by leave of the Court or a Justice, amend the indorsement so as to extend it to any other cause of action or any additional remedy or relief.

As to amendment see *High Court Procedure Act*, secs. 23, 24, Or. 24; of writ of summons, see Or. 24, r. 1. A plaintiff may, in his statement of claim, alter, modify, or extend his claim without amending the indorsement of the writ, Or.

16, r. 1. The fee on sealing an amended writ of summons is 5s. ; Rule of Court, October 6th, 1903.

3. Actions shall be of two kinds, actions *in personam* and actions *in rem*. Kinds of actions.
Cf., A.R., 1894,
r. 4.

4. Actions for condemnation of any property, or for recovery of any pecuniary forfeiture or penalty, shall be instituted in the name of the King. E. Or. 2, r. 7.
Crown actions.
Cf., A.R., 1894,
r. 5.

5. The title of actions shall be as set forth in the Appendix. Title of actions.

6. A writ of summons for the commencement of an action shall be in such one of the forms in the Appendix as is applicable, with such variations as circumstances require. Form of writ.
Cf., E. Or. 2,
rr. 3, 7.

A writ of summons was set aside on the application of the person served on the ground that no defendants' names appeared therein ; *Godfrey v. President of the Sydney School of Arts*, 10 W.N. (N.S.W.), 146.

7. When a writ is issued from a District Registry, and any defendant neither resides nor carries on business in the State in which the Registry is situated, there shall be a statement upon the face of the writ that such defendant may, at his option, cause an appearance to be entered either at the District Registry or at the Principal Registry, or to the like effect. Writ issued
from District
Registry.
Cf., E. Or. 5, r. 3.

As to issue of writs from District Registry and appearance, see H.C.P. Act, sec. 6.

8. A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, may be issued without leave. Writ for service
out of the
jurisdiction.
Q. Or. 5, r. 7.
Cf., E. Or. 2, r. 4.

The corresponding English rule requires leave to be obtained before service of writ out of the jurisdiction.

As to the issue of concurrent writs for service without and within the jurisdiction, see Or. 5, r. 2 ; as to the cases in which a service of a writ is allowed out of the jurisdiction, see Or. 8, r. 1 ; as to form of writ for service beyond the jurisdiction, see Appendix, Form 3.

Partners without the jurisdiction cannot be sued in the name of the firm ; *Alfred Shaw & Co. v. Drake and Stubbs*, 8 Q.L.J., 12 ; *Sharp v. Ball*, 19 V.L.R., 459.

9. Notice of a writ to be given out of the jurisdiction shall be in the form in the Appendix, with such variations as circumstances require. Form for
writ and
notice for service
out of the
jurisdiction.
Cf., E. Or. 2, r. 5.

As to form of notice to be served in lieu of writ beyond the jurisdiction, see Appendix, Form No. 4.

Time for
appearance to be
limited by writ.
Cf., Q. Or. 5, r. 9.

10. The time to be limited in the writ of summons for the appearance of any defendant shall be the time next hereinafter specified, according to the place of service, that is to say:—

When the Place of Service is—	Time for Appearance.
(1) Within the Commonwealth—	
If the writ is to be served within the State in which the Registry from which it is issued is situated ...	Fourteen days
If the writ is to be served within a State adjacent to the State in which the Registry from which it is issued is situated	Twenty-one days
In any other case	Twenty-eight days
Provided that if the writ is to be served in the State of Queensland, or the State of South Australia, or the State of Western Australia, at a place distant more than 600 miles from the Registry from which the writ is issued an additional time shall be allowed of	Seven days
(2) Beyond the Commonwealth—	
If the writ is to be served in New Zealand	Forty-two days
If the writ is to be served in British New Guinea or Fiji	Three months
If the writ is to be served elsewhere	Six months

For the purposes of this rule the State of Tasmania is to be deemed to be adjacent to the States of New South Wales, South Australia, and Victoria, and the State of Queensland is not to be deemed adjacent to the State of South Australia.

Distances are to be reckoned according to the nearest route ordinarily used in travelling.

As to appearance, see Or. 9 ; as to computation of time, see Or. 45 ; as to term month, meaning calendar month, see *Acts Interpretation Act* 1901, sec. 22 (b). Where the time limited by a writ of summons for appearance was incorrectly stated, it was held to be irregular. An amendment was allowed to be made, and the amended writ was ordered to be again served ; *Scougall v. Parke & Lacy Co. Ltd.*, (1902) Q.W.N., 23.

Copy to be left.
Cf., E. Or. 5,
r. 12.

11. The plaintiff, or his solicitor, shall, on presenting any writ of summons for issue, leave with the officer a copy of the writ, and of all the indorsements thereon, and the copy shall be signed by or for the solicitor leaving it, or by the plaintiff himself if he sues in person. No præcipe shall be required.

As to issue of writ, see Or. 49, r. 3.

ORDER V.

CONCURRENT WRITS.

1. The plaintiff in any action may, at the time of, or at any time during twelve months after, the issuing of the original writ of summons issue one or more concurrent writs. Each concurrent writ shall be dated as of the same day as the original writ, and shall be marked with a seal bearing the word "Concurrent," and the date of issuing the concurrent writ; and such seal shall be impressed upon the writ by the proper officer: Provided always that any such concurrent writs shall only be in force for the period during which the original writ in the action is in force.

Concurrent writ, how issued.
E. Or. 6, r. 1.

Original writs remain in force twelve months, but may be renewed from time to time; Or. 6, r. 1; as to month meaning a calendar month, see *Acts Interpretation Act* 1901, sec. 22 (b). The fee on sealing a concurrent writ for the commencement of an action is 2s. 6d.; Rule of Court, October 6th, 1903.

2. A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, may be issued and marked as a concurrent writ with a writ to be served within the jurisdiction; and a writ of summons to be served within the jurisdiction may be issued and marked as a concurrent writ with a writ to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction.

Concurrent writs for service, within and without the jurisdiction.
Cf. E. Or. 6, r. 2.

As to service of writ out of the jurisdiction, see Or. 8.

ORDER VI.

RENEWAL OF WRITS: LOST WRITS.

1. Original writs of summons shall be in force for twelve months from the date thereof, including the day of that date, and no longer; but if any defendant therein named has not been served within that time, the plaintiff may, before the expiration of the twelve months, apply to the Court or a Justice for leave to renew the writ; and the Court or Justice, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of renewal, including the day of that date, and so from time to time during the currency of the renewed writ.

Original writ in force for twelve months, but may be renewed.
Cf., E. Or. 8, r. 1.

The writ shall be renewed by being marked with the word "Renewed," and with a seal bearing the date of the day, month, and year of the renewal; which seal shall be provided and kept for that purpose at the Registry, and shall be impressed upon the writ by the

proper officer, upon delivery to him by the plaintiff or his solicitor of a precept to that effect.

A writ of summons so renewed shall remain in force and be available to prevent the operation of any Act whereby the time for the commencement of the action is limited, and for all other purposes, from the date of the issuing of the original writ.

As to concurrent writ, see Or. 5 ; as to month meaning a calendar month, see *Acts Interpretation Act* 1901, sec. 22 (b). The fee payable on sealing a renewed summons is 5s. ; Rule of Court, October 6th, 1903.

Evidence of
renewal.

Cf., E. Or. 8, r. 2.

2. The production of a writ of summons purporting to be marked with the seal of the Court, showing it to have been renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the date of the original writ, for all purposes.

As to date of writ, see *High Court Procedure Act*, secs. 4, 5.

Lost writ.

Cf., E. Or. 8, r. 3.

3. When a writ of which the production is necessary has been lost, the Court or a Justice, upon production of a copy thereof, and upon being satisfied of the loss, and of the correctness of the copy, may order that the copy shall be sealed and served, or otherwise made use of, in lieu of the original writ.

As to sealing writ, see *High Court Procedure Act*, sec. 4 (1), (2) ; as to service, see Or. 7.

Where the order of a Judge at Chambers has been lost, the same Judge may on proof of the loss and of the terms of the original order, allow an order to be drawn up in identical terms with the lost one, but may also at the same time require an order to be drawn up reciting the loss of the original order, that the loss and terms of the original order have been satisfactorily proved, and that a similar order has been allowed ; *Folletti v. Folletti*, 24 V.L.R., 62. A duplicate of a lost citation in a divorce suit was allowed to be issued ; *McHugh v. McHugh*, 20 A.L.T., 45.

ORDER VII.

SERVICE OF ORIGINATING PROCEEDINGS.

1. *Generally.*

Personal service.

Cf., E. Or. 9,
rr. 1, 2.

1. Unless otherwise prescribed or allowed, service of an originating proceeding shall be made personally. But personal service shall not be required when the party to be served, by his solicitor, undertakes in writing to accept service, and enters an appearance.

An "originating proceeding" means the document by which a cause or matter is commenced ; Or. 1, r. 1.

As to substituted service, see rr. 8, 9, *infra* ; as to service out of the jurisdiction, see Or. 8.

A solicitor failing to enter an appearance in pursuance of his written undertaking is liable to attachment ; Or. 9, r. 9.

As to service on partners or firms, see Or. 36, rr. 5, 6 ; as to time of day for service, see Or. 45, r. 7 ; as to service generally, see Or. 47.

Where a writ has not been personally served the service may be set aside ; *Newton v. Webster*, 6 S.C.R. (N.S.W.), 12 ; *Hudson Bros. v. Wilkinson*, 6 W.N. (N.S.W.), 114.

For observations upon personal and substituted service generally, see *Rudd v. John Griffiths Cycle Co. Ltd.*, 23 V.L.R., 350.

2. Personal service shall be effected, in the case of a writ of summons, originating summons, or other document authenticated by signature or seal, by delivering to and leaving with, or offering to deliver to and leave with, the person to be served, a copy of the writ, summons, or other document, in such a condition as to be open for examination, and at the same time showing him the original writ, summons, or other document, if he requires it ; and, in the case of any other document, by delivering or offering to deliver it to the person to be served in such a condition as to be open for examination.

Personal service,
how effected.
Q., Or. 10, r. 2.

As to applications made by originating summons, see Or. 1, r. 1 ; as to personal service of other documents, see Or. 47, r. 1 ; as to substituted service, see rr. 8, 9, *infra*, Or. 47, r. 2 ; as to service on partners or firms, see Or. 36, rr. 5, 6.

2. On Particular Defendants.

3. When a husband and his wife are both parties to a cause or matter, they shall both be served unless the Court or a Justice otherwise orders.

Husband and
wife.
E. Or. 9, r. 3.

As to actions by and against married women ; see Or. 2, r. 13.

4. When an infant is a party to a cause or matter, service on his father or guardian, or, if he has none, then upon the person with whom the infant resides or under whose care he is, shall, unless the Court or a Justice otherwise orders, be deemed good service on the infant ; but the Court or Justice may order that service made or to be made on the infant himself shall be deemed good service.

Infants.
E. Or. 9, r. 4.

As to actions by and against infants, see Or. 2, rr. 12, 15, 17 ; as to substituted service on infant, see note to r. 8, *infra*.

5. When a person of unsound mind is a party to a cause or matter, service on the committee, if any, of his person or estate, as the case may be, or, if he has not been found or declared to be of unsound mind, or if he has been so declared but a committee of his person or estate, as the case may be, has not been appointed, service on the

Lunatics.
Cf., E. Or. 9, r. 5.

person with whom he resides or under whose care he is, shall, unless the Court or a Justice otherwise orders, be deemed good service on such party.

As to actions by and against lunatics, see Or. 2, rr. 14, 17.

3. On Corporations and other Bodies.

Service on
corporations,
&c.
Cl., E. Or. 9, r 8

6. In the absence of any statutory provision regulating service of process, an originating proceeding to be served on a corporation aggregate, whether incorporated under the laws of the Commonwealth or of a State or not, may be served on the mayor or other head officer, or on the town clerk, manager, or other chief officer, of the corporation within the Commonwealth; and when by any Act provision is made for service of any legal process upon any corporation, or upon any society or fellowship, or any body or number of persons, whether corporate or unincorporate, an originating proceeding may be served in the manner so provided.

The wording differs somewhat from that of the rules in force in certain States, where the words "clerk" or "secretary" occur. In Queensland the word "clerk," in 31 Vict., No. 4, sec. 14, was held to mean a clerk in the nature of a secretary or principal officer; *Paterson v. A. U. S. N. Co.*, 2 S.C.R. (Q.), 9; *Woodland v. Gold Bicycle Co.*, 9 Q.L.J., 28. Compare also *Bowden Bros. and Co. v. The Imperial Marine &c. Co.*, (1902) S.R. (N.S.W.), 257. Service on a foreign corporation cannot be effected by service on an agent; *Bendall v. Oceanic Steam Navigation Company*, 17 W.N. (N.S.W.), 157; or on an agent appointed for certain special business: *Glanville v. J. B. Lippincott Co.*, 17 W.N. (N.S.W.), 74; or on the late manager of a corporation, after the corporation has ceased to reside within the jurisdiction; *Baker v. Walker Sons and Bartholomew Ltd.*, 18 W.N. (N.S.W.), 282. Where a company had no registered office within Victoria, but carried on business there through an agent, who was not one of the persons mentioned in the Victorian rule, service on him was held not to be good service on the company; *McCue v. A. U. S. N. Co.*, 15 V.L.R., 332. Service of a summons, to be heard before Justices, on a person in Victoria, who was the corresponding secretary of a foreign company, having its registered office in London, but carrying on business in Victoria, was held to be a good service on the company; *Kelly v. Queen's Birthday U. G. M. Co.*, 21 V.L.R., 335. Service of a writ upon an agent of a foreign corporation appointed by a registered power of attorney to defend actions in Victoria, on behalf of such corporation, whose power of attorney had been revoked, but the revocation not registered prior to the service of the writ, was held bad service; *Rudd v. John Griffiths Cycle Co.*, 23 V.L.R., 350.

A foreign company is not carrying on business in Victoria by reason only of the fact that it employs a commercial traveller to take orders on commission in that State, and to transmit them to its office abroad; *Pearce v. Tower M. & N. Co.*, 24 V.L.R., 506. As to residence of a foreign corporation within the jurisdiction, see H.C.P. Act, sec. 6, *supra*, p. 215.

4. *Indorsement of Date of Service.*

7. The person serving a writ of summons shall, within three days after the service, indorse on the writ the day of the month and week of the service thereof; otherwise the plaintiff shall not, without leave of the Court or a Justice, be at liberty, in case of default of appearance, to proceed as upon default; and every affidavit of service of the writ shall mention the day on which such indorsement was made.

Indorsement to be made on writ within three days.
Ct., E. Or. 9, r. 15.

As to proceedings in default of appearance, see Or. 10; as to method of computing time limited by this rule, see Or. 45.

A failure to indorse the writ as required by this rule is not a sufficient ground to set aside judgment by default; *Kellaway v. Emerson*, 4 Q. L.J., 56.

5. *Substituted Service.*

8. If it is made to appear to the Court or a Justice that a party is from any cause unable to effect prompt personal service, or service in any other prescribed manner, of the originating proceeding, or any other proceeding requiring service, the Court or Justice may make such order for substituted service, or for the substitution for service of notice, by advertisement or otherwise, as is just.

Substituted service may be allowed.
Ct., E. Or. 9, r. 2.

As to personal service, see rr. 1, 2, *supra*; as to evidence required on application, see r. 9, *infra*; as to service out of the jurisdiction, see Or. 8; as to substituted service of other documents, see Or. 47, r. 2.

PERSONS SERVED IN SUBSTITUTION.—Substituted service has been ordered on an auctioneer selling land on behalf of the defendant, where the land formed the subject-matter of the action; *Wilkie v. Fattorini*, 1 S.C.R. (E.), (N.S.W.), 32; on the solicitor of a party; *Ker v. Panton*, 12 W.N. (N.S.W.), 161; *In re Federal Ice Co. Ltd.*, 7 B.C. (N.S.W.), 24; *Lonsdale v. Batman*, 1 W. & W. (E.), 341; *O'Sullivan v. Huon*, 7 V.L.R. (E.), 109; *Howse v. Campbell*, 7 V.L.R. (E.), 145; on a general agent; *Ross v. O'Callaghan*, 2 W. & W. (E.), 156; on a special agent; *Duhig v. Shannon*, 1 W.W. & A'B. (E.), 25; on the chief officer of a foreign firm carrying on business within the jurisdiction but not registered there; *Neville v. National F. and M. Ins. Co.*, 1 Q.L.J., 23; on a relation; *Connolly v. Connolly*, 19 W.N. (N.S.W.), 144; *Homer v. Homer*, 1 W. & W. (I.E. & M.), 33; on a relation who acted as a manager of defendant's business within the jurisdiction; *Alfred Shaw & Co. v. Page*, 7 Q.L.J. (N.C.), 26; on a liquidator under a voluntary liquidation, it appearing that the company had ceased to carry on business and had no registered office; *In re Imperial Deposit Bank*, 10 Q.L.J. (N.C.), 55.

SERVICE BY ADVERTISEMENTS.—As to service by means of advertising, see *Re Smith*, 1 W.W. & A'B. (I.E. & M.), 1; *McNulty v. McNulty*, *ib.*, 85.

DEFENDANT WITHOUT THE JURISDICTION.—It was held in *Allen v. Allen*, (1902) S.R. (Q.), 306, by Griffith, C.J., that where one of several defendants to an action could not be served by reason of his absence in parts unknown, that an order

for substituted service should be obtained. In *Alfred Shaw & Co. v. Page*, 9 Q.L.J. (N.C.), 26, where a writ was issued for service within the jurisdiction, the plaintiff being aware that, at the date of the writ, the defendant was without the jurisdiction, and a concurrent writ for service without the jurisdiction was taken out, personal service of the concurrent writ, and the order for service on a person within the jurisdiction was ordered. In the State of Victoria the only power to issue against and serve a writ on a British subject residing out of the jurisdiction is given by sec. 59 of the *Judicature Act 1883* (No. 761). See *Payne v. Fink*, 24 V.L.R., 471, and authorities referred to in argument.

In *Ross v. Callaghan*, 2 W. & W. (E.), 156, substituted service on trustees of an infant out of the jurisdiction was refused, but an order was made to serve him out of the jurisdiction, the service to be accompanied with a notice that, failing the due appointment of a guardian, the plaintiff would apply for the appointment of a nominee of his own as a guardian.

Evidence.

E. Or. 10, r. 1.

9. Every application to the Court or a Justice for an order for substituted or other service, or for the substitution of notice for service, shall be supported by an affidavit setting forth the grounds upon which the application is made.

As to affidavits generally, see Or. 32.

AFFIDAVITS SETTING FORTH GROUNDS OF APPLICATION.—The affidavit in support should state how the service is proposed to be effected; *London Discount &c. Bank v. Daish*, 11 A.L.T., 180. Some reasonable probability should be shown that the method of service to be adopted may bring knowledge of the writ to the defendant; *London Discount &c. Bank v. Daish*, 16 V.L.R., 325. The order may be made, although the inquiries as to the defendant's whereabouts, which form the basis of the application, are made prior to the issue of the writ; *Groves Mc Vitty & Co. v. Barkas*, 20 A.L.T., 1.

SETTING ASIDE SUBSTITUTED SERVICE.—*Quere*, whether a person on whom an order for substituted service has been made has a right to move to set it aside; *House v. Campbell*, 7 V.L.R. (E.), 145.

ORDER VIII.

SERVICE OUT OF THE JURISDICTION.

In certain cases service of writ, &c., allowed out of jurisdiction. Cf., E. Or. 11, r. 1.

1. An originating proceeding, or notice thereof, may be served out of the jurisdiction of the Court in any of the following cases, that is to say :—

- (1) When the subject-matter of the cause, so far as it concerns the party to be served, is—
 - (a) Land or other property situate within the Commonwealth, with or without rents or profits thereof; or
 - (b) Any shares or stock of a corporation or joint stock company having its principal place of business within the Commonwealth; or

- (c) Any instrument or thing affecting any such land, property, shares, or stock ;
- (2) When any contract in respect of which relief is sought in the cause against the party by way of enforcing, rescinding, dissolving, annulling, or otherwise affecting, the contract, or by way of recovering damages or obtaining any other remedy against the party for a breach thereof, was made or entered into within the Commonwealth ;
- (3) When the relief sought against the party is in respect of a breach within the Commonwealth of a contract, wherever made ; or
- (4) When any act or thing sought to be restrained or recovered or for which damages are sought to be recovered, was done or is to be done or is situate within the Commonwealth.

In the case of an action, the indorsement of claim on the writ of summons shall be in such a form as to show that the subject-matter of the action is within the provisions of this Rule.

An originating proceeding is the document by which a cause or matter is commenced ; Or. 1, r. 1.

A writ for service without the jurisdiction may be issued without leave, see Or. 4, r. 8.

As to taking evidence out of the jurisdiction, see H.C.P. Act, secs. 19, 22 ; as to form of writ for service out of the jurisdiction, and indorsement thereon, see Appendix, Form 3.

JURISDICTION OVER RESIDENTS.—The Court in New South Wales was held to have jurisdiction to entertain a suit against an alien temporarily resident in the jurisdiction, provided he was served while so resident, although the suit arose out of a contract made in France, to be performed in New Caledonia ; *Australian Assets Co. Ltd. v. Higginson*, 18 N.S.W.L.R. (E.), 189. See also *Horner v. Hodgson*, 3 W.N. (N.S.W.), 58. The same rule applies to foreign corporations ; *Bowden Bros. v. Imperial M. and T. Ins. Co.*, (1902) S.R. (N.S.W.), 257.

“ WITHIN THE COMMONWEALTH.”—In the following cases arising out of contracts the Court was held to have jurisdiction ; where the defendants, who were resident out of Queensland, agreed to remit to Queensland the proceeds of plaintiffs goods sold by them ; *Alfred Shaw & Co. v. Drake & Stubbs*, 8 Q.L.J., 12 ; goods sent from one State to another on an order received from such other State ; *Melbourne Chilled Butter and Produce Co. v. Downs*, 25 V.L.R., 559 ; *Gilles v. Langlands Foundry Co.*, 1 W.N. (N.S.W.), 127 ; *Menzies v. Williams*, 10 W.N. (N.S.W.), 13 ; upon a promissory note where the presumption was that it was both made and delivered in Melbourne ; *L. Stevenson & Sons Ltd. v. Rosenfeld*, 20 A.L.T., 153 ; where a defendant executed a mortgage in England under the *Transfer of Land*

Act over land in Victoria, the place of payment being found by the Court to have been in Melbourne, and the breach took place within the colony ; Bank of Victoria v. Robertson, 23 V.L.R., 3.

Where, in the course of an action commenced in England by a company whose registered office is in Victoria, against defendants resident in England, a contract is made in England between the parties, but no place of performance is mentioned therein, the Court of the colony will infer that the contract was to be performed in England, where it was made ; *Melbourne Chilled Butter Co. Ltd. v. Warrick, 25 V.L.R., 346.*

As to British subjects residing beyond the Commonwealth.

Cf., E. Or. 11, r. 4.

2. If the party to be served is a British subject, the Court or a Justice, upon being satisfied by affidavit that the subject-matter of the cause is such that, under the provisions of the last preceding Rule, the originating proceeding may be served out of the jurisdiction, and that it was personally served upon a party out of the jurisdiction, or that reasonable efforts were made to effect personal service thereof upon the party and that it came to his knowledge, and either that he wilfully neglects to appear in the cause, or that he is living out of the jurisdiction of the Court in order to defeat and delay the plaintiff, may direct from time to time that the plaintiff or petitioner shall be at liberty to proceed in the cause in such manner and subject to such conditions as the Court or Justice thinks fit.

"BRITISH SUBJECT."—A company which carried on business in a British possession out of Victoria was held not to be a "British subject" ; *Moore v. Moodyville Lands & Sawmills Co.*, 26 V.L.R., 226 ; approving *Lempriere v. New Pinnacle Group Silver Mining Co.*, 25 V.L.R., 363 ; *Connell v. Neill & Co.*, 7 W.N. (N.S.W.), 6.

PARTNERS OUT OF THE JURISDICTION.—A firm carrying on business out of the jurisdiction, and not carrying on business within the jurisdiction, cannot be sued in the name of the firm, and the writ cannot be served on it as a firm. In such a case the plaintiff must sue the members of the firm individually, and the writ must be served on the members individually ; *Sharp v. Ball & Ellis*, 19 V.L.R., 459 ; *Shaw & Co. v. Drake & Stubbs*, 8 Q.L.J., 12.

"WILFUL NEGLECT TO APPEAR."—It is not sufficient to state in the affidavit that the defendant was "personally served," and to show that although a reasonable time had elapsed within which the defendant might have appeared, no appearance had been entered. It is necessary to set out facts sufficient to satisfy the judge that the neglect to appear is wilful. Where the defendant, who was described in the writ as an accountant, was stated to have been personally served at Fremantle (W.A.), with a copy of the writ, and notice that if he neglected to appear, plaintiff might apply to the Court for leave to proceed, it was held there was not sufficient evidence of wilful neglect ; *Prunier v. Peacock*, 19 V.L.R., 396, not followed ; *Quinn v. Macartney*, 18 V.L.R., 42, followed ; *Hoare v. Jenkins*, 21 V.L.R., 117. Compare also, *L. Stevenson & Sons v. Hartle*, 4 A.L.R. (C.N.), 53.

3. When the originating proceeding is an instrument under the seal of the Court, and the defendant is neither a British subject nor in British dominions, notice of the instrument, and not the instrument itself, is to be served upon him. Such service shall have the same force and effect as service of a writ of summons or other originating proceeding upon a British subject; and by leave of the Court or a Justice, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon.

As to foreigners residing out of the jurisdiction. Cf., E. Or. 11, r. 6.

As to effect of service of writ on British subject out of jurisdiction, see r. 2, *supra*.

For form of notice, see Appendix, Form 4.

ORDER IX.

APPEARANCE.

1. *General.*

1. A defendant shall enter his appearance to a writ of summons in the District Registry from which the writ was issued, or, at his option, in cases in which he is permitted by this Act to enter it at the Principal Registry, at the Principal Registry; according to the exigency of the writ.

Appearance to writ of summons. Cf., E. Or. 12, rr. 1, 4.

As to Registry in which appearance may be entered, see H.C.P. Act, sec. 6; as to time limited for appearance, see Or. 4, r. 10; as to proceedings in default of appearance, see Or. 10.

The fees payable on entering an appearance, for each person, 2s. 6d.; if by a corporation or joint stock company or a company incorporated by Statute or Royal Charter, 10s.; Rules of Court, October 6th, 1903.

2. A party entering an appearance shall do so by delivering to the proper officer a memorandum in writing dated on the day of its delivery, and containing the name of his solicitor, or stating that he appears in person.

Mode of entering appearance. Cf., E. Or. 12, r. 8.

There shall at the same time be delivered to the officer a duplicate of the memorandum, which the officer shall seal with the official seal, showing the date on which it is sealed, and shall then return to the person entering the appearance. The duplicate memorandum so sealed shall operate as a certificate that the appearance was entered on the day indicated by the seal.

For entry of conditional appearance, see r. 12, *infra*. The memorandum must contain an address for service; see rr. 3, 4, *infra*; as to appearance in an action against partners, see Or. 36, rr. 7, 8, 9; for form of entry of appearance, see Appendix, Forms 6, 9; for form of entry of conditional appearance where defendant denies the jurisdiction of the Court, see Appendix, Form 7; for form of affidavit for entry of appearance of a guardian, see Appendix, Form 8.

Defendant's
address for
service.
Cf., E. Or. 12,
r. 10.

3. The solicitor of a defendant appearing by a solicitor shall state in such memorandum his name or firm and place of business, and also, if his place of business is distant more than one mile from the Registry at which the appearance is entered, a place to be called his address for service, which shall not be more than one mile from that Registry, where any proceedings in the action may be left for him. And, if the solicitor is only agent for another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.

Defendant
appearing in
person.
Cf., E. Or. 12,
r. 11.

4. A defendant appearing in person shall state in such memorandum his address, and also a place, to be called his address for service, which shall not be more than one mile from the Registry at which the appearance is entered.

Irregular
memorandum.
Fictitious
address.
E. Or. 12, r. 12.

5. If the memorandum does not contain such address it shall not be received; and, if the address is illusory or fictitious, the appearance may be set aside by the Court or a Justice on the application of the plaintiff.

Memorandum of
appearance.
E. Or. 12, r. 13.

6. The memorandum of appearance shall be in the form in the Appendix with such variations as circumstances require.

Defendants
appearing by
same solicitor.
E. Or. 12, r. 17.

7. If two or more defendants in the same cause appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum.

Notice of
appearance.
Cf., E. Or. 12,
r. 9.

8. A defendant shall, on the day on which he enters his appearance, give notice of his appearance, in the form in the Appendix, to the plaintiff's solicitor, or, if the plaintiff sues in person, to the plaintiff himself. The notice may be given either by notice in writing served in the ordinary way at the address for service, or by prepaid letter directed to that address and posted on the day of entering appearance, and shall in either case be accompanied by the sealed duplicate memorandum.

For form of notice of appearance see Appendix, Form No. 9.

The failure of the defendant to serve a sealed duplicate memorandum of appearance does not render the appearance a nullity, and a plaintiff cannot sign judgment thereupon as for default of appearance; *Lyman v. Franklin*, 15 V.L.R., 2. Compare also *North Melbourne &c. Building Society v. Vrendenberg*, 7 A.L.T., 38.

Appearance at
Principal
Registry to be
notified by
telegraph to
District
Registry in
certain cases.

8A. If a defendant, being entitled to enter his appearance either at a District Registry or at the Principal Registry, elects to enter it at the Principal Registry, the Principal Registrar shall on the same day, at the cost of the defendant, notify to the District Registrar by telegraph that the appearance has been entered.

This rule was included in the Rules of Court of 12th October, 1903.

9. A solicitor who fails to enter an appearance in pursuance of his written undertaking so to do shall be liable to attachment.

Solicitor not entering appearance.
E. Or. 12, r. 18.

10. A defendant may appear at any time before judgment. If he appears after the time limited for appearance, he shall not, unless the Court or a Justice otherwise orders, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the exigency of the writ.

Time for appearance.
E. Or. 12, r. 22.

As to times limited for appearance, see Or. 4, r. 10.

11. In an action *in rem*, any person not named in the writ may intervene and appear on filing an affidavit showing that he is interested in the *res* under arrest, or in the fund in Court.

Admiralty intervention.
A.R. 1894, r. 23.
Cf., E. Or. 12, r. 24.

12. A defendant in any cause may enter a conditional appearance, denying the jurisdiction of the Court, and shall not thereby be deemed to have submitted to the jurisdiction, except as to the costs occasioned by the appearance or by any application under this Rule; and he may thereupon apply to the Court or Justice for an order to set aside the service upon him of the originating proceeding, or the service upon him of notice thereof, as the case may be.

Conditional appearance.
A.R. 1894, r. 24.
Cf., E. Or. 12, r. 30.

Or he may make such application before appearing, and without entering a conditional appearance.

If he enters a conditional appearance, and does not make such application promptly, the Court or Justice may set aside the conditional appearance with costs, to be paid by the defendant by whom it was entered.

If the application is made and dismissed, the conditional appearance shall be struck out, and the defendant may enter an appearance as in other cases.

For form of entry of conditional appearance, see Appendix, Form No. 7; form of notice of conditional appearance Appendix, Form No. 9.

As to the entry of an appearance other than a conditional appearance being a waiver of objection to the jurisdiction, see *Granoewski v. Shaw*, 7 Q.L.J., 18; *North British Fire Ins. Co. v. Scottish Imperial Fire and Life Insurance Co.*, 1 Q.L.J., 143; *Perkins v. Williams*, 17 W.N. (N.S.W.), 135.

In Victoria a defendant may enter an appearance to a writ of summons "under protest," and, in doing so, he does not waive any objections he may have to the form or service of writ; *Hadley & Co. v. Henry*, 21 V.L.R., 646.

Where an unconditional appearance has been entered by mistake, a Judge can, before notice of appearance has been served, make an *ex parte* order giving the defendant leave to enter a conditional appearance; *Glasford Cook & Co. v.*

Wm. Higson & Co., 20 A.L.T., 266. Leave may be granted to an interested party, not a defendant, to enter a conditional appearance, in order to apply to set aside the writ; *Main v. Duerdin*, 7 A.L.T., 139.

2. *Persons under Disability.*

Appearance by
infant.
Cf., E. Or. 16,
r. 18.

13. An order for the appointment of a guardian *ad litem* of an infant in an action shall not be necessary, but the solicitor applying to enter an appearance for the infant shall make and file an affidavit in the form in the Appendix, with such variations as circumstances require.

As to actions by and against persons under a disability, see Or. 2, r. 12, *et seq.*; as to proceedings when no appearance is entered, see Or. 10, r. 1. For form of affidavit, see Appendix, Form No. 8.

Guardian *ad
litem* in matters
other than
actions.
Cf., E. Or. 16,
r. 19.

14. An infant served with an originating proceeding in any cause or matter, not being an action, may appear on the hearing of the cause or matter by a guardian *ad litem* in all cases in which the appointment of a special guardian is not provided for. An order for the appointment of such guardian shall not be necessary, but the solicitor by whom he appears shall previously make and file an affidavit as in the last preceding Rule mentioned.

Other cases.
Q. Or. 12, r. 25.

15. When proceedings in any cause or matter are directed to be continued against an infant, or an infant is at liberty to attend any proceedings in a cause or matter, he shall appear as in the last preceding Rule directed.

As to change of parties, and order to carry on proceedings when an infant is a party affected, see Or. 11, rr. 4-7.

ORDER X.

DEFAULT OF APPEARANCE.

Default of
appearance by
infant or person
of unsound
mind.

1. When no appearance is entered to a writ of summons for a defendant who is an infant or a person of unsound mind who has not been so found or declared, the plaintiff shall, before proceeding with the action against the defendant, apply to the Court or a Justice for an order that some proper person be appointed as guardian of the defendant, by whom he may appear and defend the action.

Notice of
application.
Cf., E. Or. 13,
r. 1.

Such an order shall not be made unless it appears that the writ of summons was duly served, and that notice of the application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care the defendant is then residing, and also, if the

defendant is an infant not residing with or under the care of his father or guardian, served upon or left at the dwelling-house of the father or guardian, if any, of the infant, unless the Court or Justice at the time of hearing the application dispenses with the last-mentioned service.

When a guardian has been appointed, he shall have the same time for appearance after the service of the order on him as if it were a writ of summons.

As to actions by and against persons under a disability, see Or. 2, r. 12, *et seq.* ; as to entry of appearance by persons under a disability, see Or. 9, r. 13, *et seq.* ; as to the times limited for appearance to writs of summons, see Or. 4, r. 10 ; as to service upon infants and persons of unsound mind, see Or. 7, rr. 4, 5 ; as to computation of time fixed by this rule, see Or. 45.

A guardian *ad litem*, cannot be appointed on the application of the plaintiff until after the infant has been served ; *Dodgson v. Ginn*, 3 V.L.R. (E.), 74.

In *Buchanan v. Smith*, 9 A.L.T., 203, a solicitor was assigned in preference to a layman as guardian *ad litem* to an infant defendant resident out of the jurisdiction and who had not appeared to the action or appointed a guardian *ad litem*.

2. When a defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following Rules of this Order, he shall, before taking such proceeding upon default, file an affidavit of service of the writ, or of notice in lieu of service, as the case may be.

Default of appearance generally.
Cf., E. Or. 13, r. 2.

Default of appearance of the defendant at the trial ; see Or. 30, r. 16.

Plaintiff must serve the writ of summons and file an affidavit of service before signing judgment, even though the defendant's solicitor has undertaken to accept service ; *Coburn v. Brotchie*, 16 V.L.R., 6.

3. When the writ of summons is indorsed for a debt or liquidated demand only, and the defendant fails, or all the defendants, if more than one, fail, to appear thereto, the plaintiff may enter final judgment against such defendant or defendants for any sum not exceeding the sum indorsed on the writ, together with interest at the rate claimed by the indorsement at the rate agreed upon, if any, or, if no rate is claimed to have been agreed upon, at the rate of five per centum per annum, to the date of the judgment, and costs.

Liquidated demand indorsed.
Cf., E. Or. 13, r. 3.

Where a claim is for a liquidated demand and the defendant has not appeared but consented to judgment, the proper practice is for the plaintiff to enter final judgment in default of appearance, and not to apply to enter judgment by consent ; *Green v. Rowe*, 23 V.L.R., 349.

As to fee payable on entering judgment, see Rule of Court, October 6th, 1903, sub-title "Drawing up and Entering Judgment."

Liquidated
demand : Several
defendants.
Cf., E. Or. 13,
r. 4.

4. When the writ is indorsed for a debt or liquidated demand, and there are several defendants, of whom some appear to the writ, and others fail to appear, the plaintiff may enter final judgment as by the last preceding Rule provided against the defendants so failing to appear.

Judgment being entered against any defendant does not prejudice the plaintiff's right to proceed on action against the others ; r. 10, *infra*.

Detention of
goods : Damages.
Cf., E. Or. 13,
r. 5.

5. When the writ is indorsed with a claim for detention of goods and pecuniary damages, or either, and the defendant fails, or all the defendants, if more than one, fail, to appear, the plaintiff may enter interlocutory judgment against such defendant or defendants, and a writ of inquiry may issue to assess the value of the goods and the damages, or either, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ. But the Court or a Justice, instead of issuing a writ of inquiry, may order that the value and the damages, or either, shall be ascertained in any other way which the Court or Justice directs.

As to writs of inquiry and references as to damages, see Or. 30, r. 25, *et seq.* The fee on sealing a writ of inquiry is 10s. Rule of Court 6th October, 1903.

Several
defendants.
E. Or. 13, r. 6.

6. When the writ is indorsed as in the last preceding Rule mentioned, and there are several defendants, of whom some appear to the writ, and others fail to appear, the plaintiff may enter interlocutory judgment against the defendants so failing to appear. And in that case the value of the goods and the damages, or either, as the case may be, may be assessed, as against the defendants suffering judgment by default, at the same time as the trial of the action or issue therein against the other defendants. But the Court or a Justice may order that instead of proceeding to such trial, the value and the damages, or either, shall be ascertained by a writ of inquiry as directed by the last preceding Rule, or in any other way which the Court or Justice directs.

As to writs of inquiry and references as to damage, see Or. 30, r. 25.

Liquidated
demand and
detention of
goods, and
damages.
Cf., E. Or. 13,
r. 7.

7. When the writ is indorsed with a claim for detention of goods and pecuniary damages, or either, and is further indorsed for a debt or liquidated demand, and any defendant fails to appear to the writ, the plaintiff may enter final judgment against him for the debt or liquidated demand, with interest and costs, and may also enter interlocutory judgment for the value of the goods and the damages, or either, as the case may be, and may proceed as provided in Rules 5 and 6 of this Order.

As to writs of inquiry and reference as to damages, see Or. 30, r. 23.

8. Any judgment by default under this Order may be set aside or varied by the Court or a Justice upon such terms as to costs or otherwise as the Court or Justice thinks fit. Setting aside judgment by default.
E. Or. 13, r. 10.

As to setting aside judgment by default of pleading, see Or. 23, r. 11; by default of appearance at trial, see Or. 30, r. 18; as to relief against judgment and orders, see Or. 34; as to staying proceedings, see Or. 38.

The failure to endorse on the writ the day and month of service is not a sufficient ground for setting aside a judgment by default; *Kellaway v. Emerson*, 4 Q.L.J., 56. Judgment by default was set aside on terms in *Reynolds v. Foden*, 2 Q.L.J., 41. There is an inherent power in the Court to prevent an abuse of its proceedings, and a judgment will be set aside if the circumstances of the case require it; *Levy & Co. v. Bryant*, 4 Q.L.J., 125.

9. In all actions not by this Order otherwise specially provided for, in case any defendant does not appear within the time limited by the writ for appearance, the plaintiff may, upon filing a proper affidavit of service and a statement of claim, proceed in the action as if the defendant had appeared. Default of appearance in actions not otherwise specially provided for.
Cf., E. Or. 13, r. 12.

As to filing statement of claim in Registry when no appearance entered, see Or. 14, r. 7.

“FILING STATEMENT OF CLAIM.”—Where a statement of claim had not been filed, the Court would not at the trial accept the defendant's consent to be bound by the proceedings. The delivery is imperative; *Embling v. Perry*, 23 V.L.R., 70. Under special circumstances where serious consequences might otherwise result, the Court at the trial might dispense with a strict adherence to this rule, but in ordinary circumstances will decline to do so. Any defendant appearing may raise the objection that the plaintiff is not then in a position to get a judgment against a co-defendant who has not appeared by reason of the non-filing of a statement of claim against him, if his presence is necessary for the protection of the party appearing; *Crowley v. Sandhurst and Northern District Trustees Co.*, 23 V.L.R., 661. See also *Falkingham v. Harbinson*, 24 V.L.R., 764.

Where there is no appearance to a writ indorsed for trial without pleading, the plaintiff should proceed by filing a statement of claim; as the provisions of Or. 13 apply only to cases in which an appearance has been entered; *Machin v. Edwards*, 27 V.L.R., 134.

10. In any case in which a plaintiff enters judgment under the provisions of this Order against any defendants who fail to appear, the entry of judgment shall not, nor shall the issue of execution thereon, prejudice his right to proceed in the action against the other defendants. Effect of judgment by default.
Cf., E. Or. 13, r. 4.

As to entry of judgment against one of several defendants, see rr. 4-6.

ORDER XI.

CHANGE OF PARTIES.

1. A cause or matter shall not become abated by reason of the marriage, death, or insolvency of any of the parties, if the cause of Action not abated where cause of action continues.

Ct., E. Or. 17,
r. 1.

action survives or continues, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*.

As to parties generally, see Or. 2.

In Victoria it has been held that where the rights of the parties are ascertained in a suit, one of the defendants to which has since died, the Court may order the payment out of part of the fund in Court, without the suit being revived; *Cameron v. M'Namara*, 11 V.L.R., 664.

Where after the date of a conditional order for foreclosure, one of the defendants has become insolvent, his assignee must be joined; *Bromfield v. Cramer*, 1 A.L.R., 152.

After a liquidator of a company has made his return to the Registrar-General in accordance with sec. 129 of the *Companies Act* 1890 (Vic.), the Court has no jurisdiction to grant an injunction restraining the dissolution of the company. The company is dead after the return made; *John Birch & Co. v. The Patent Cork Asphalt Co. Ltd.*, 21 V.L.R., 268.

In case of marriage, &c., or devolution of estate, Court may order successor to be made a party or served with notice.

E. Or. 17, r. 2.

2. In case of the marriage, death, or insolvency, or devolution of estate by operation of law, of any party to a cause or matter, the Court or a Justice may, if it is necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest, if any, of the party shall be made a party, or shall be served with notice in such manner and form as hereinafter prescribed, on such terms as are just, and may make such order for the disposal of the cause or matter as is just.

As to obtaining of such order *ex parte*, see r. 4, *infra*; as to service upon continuing and new parties of order and indorsement thereon of notice requiring entry of appearance, r. 5, *infra*; as to discharge of order on application of person affected, see rr. 6, 7, *infra*.

In case of assignment, creation, or devolution of estate or title, action may be continued.

E. Or. 17, r. 3.

3. In case of an assignment, creation, or devolution of any estate or title *pendente lite*, the cause or matter may be continued by or against the person to or upon whom the estate or title has come or devolved.

Order to carry on proceedings.
Ct., E. Or. 17,
r. 4.

4. When by reason of marriage, death, or insolvency, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and the new party may be obtained *ex parte*, either by any continuing party, or by any person who is made a party, on appli-

cation to the Court or a Justice, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence.

If the party applying to be made a party as plaintiff is an infant, the application must be made by him by his next friend.

As to service on new parties of the order continuing proceedings and the indorsement thereon of notice requiring entry of appearance, see r. 5, *infra*; as to discharge of order on application of person affected, see rr. 6, 7; as to appointment of next friend, see Or. 2, rr. 15, 16; as to appearance by infant, see Or. 9, rr. 13, 14.

With respect to a similar Victorian rule, Or. 17, r. 4, Williams, J., observed: "I am inclined to think that that rule applies only to cases where an event has happened which involves a transfer of interest by operation of law, i.e., the words 'or any event,' are *ejusdem generis*, and mean something about which there is no doubt, which in law operates to effect a change or transfer of interest. This is borne out by the subsequent words, by reason of any person interested coming into existence after the commencement of the cause or matter. I am not firmly wedded to that opinion, but that is the inclination of my opinion"; *Godfrey v. Forrest*, 19 19 V.L.R., 395. It is no objection to the adding of executors as parties that the proceedings were instituted under an assumed designation; *The Trent Brewery v. Lehane*, 21 V.L.R., 283.

On the death of a defendant against whom a judgment with costs had been obtained, and which has not been satisfied before the death, an application for leave to add his executors as parties to the action should be made *ex parte*; *Chambers v. Farrar*, 14 V.L.R., 561. Where an interim injunction had been granted against the Registrar of Titles, who subsequently resigned his position as Registrar, an order was made that his successor be defendant in his place; *Henry v. Dick*, 18 A.L.T., 108.

5. Every order made under the last preceding Rule shall, unless the Court or Justice otherwise directs, be served upon the continuing parties, and also upon each such new party, unless the person making the application is himself the only new party; and the order shall from the time of such service, subject nevertheless to the next two following Rules, be binding on the person served therewith; and every person served therewith who is not already a party to the cause or matter shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons. Notice of such obligation to appear shall be indorsed on the order before service.

Service of order to continue action.
Ct., E. Or. 17, r. 5.

As to time limited for appearance to writ, see Or. 4, r. 10; as to entry of appearance, see Or. 9; as to service of documents generally, see Or. 47.

6. When any person who is under no disability, or who is under no disability other than coverture, or who, being under some disability other than coverture, has a guardian *ad litem* in the cause or matter, is served with an order made under Rule 4 of this Order, he

Application to discharge order by person under no disability or having a guardian.
Ct., E. Or. 17, r. 6.

may apply to the Court or a Justice to discharge or vary the order at any time within eight days after the time allowed for appearance.

As to computation of the time limited by this rule, see Or. 45.

By person under disability, having no guardian.
E. Or. 17, r. 7.

7. When any person who is under any disability other than coverture, and has no guardian *ad litem* in the cause or matter, is served with an order made under Rule 4 of this Order, he may apply to the Court or a Justice to discharge or vary the order at any time within eight days after the time allowed for the appearance of his guardian *ad litem* when duly appointed; and until the period of eight days has expired the order shall have no force or effect as against the last-mentioned person.

As to computation of time limited by this rule, see Or. 45.

Death of sole plaintiff or defendant.
Or., E. Or. 17, r. 8.

8. When the plaintiff or defendant in a cause dies, and the cause of action survives, but the plaintiff or the person entitled to proceed fails to proceed, the defendant, or the person against whom the cause may be continued, may apply to a Justice for an order requiring the plaintiff or the person entitled to proceed to do so within such time as is ordered: And in default the Justice may order the cause to be dismissed for want of prosecution, with or without costs, as in other cases.

For dismissal for want of prosecution, through default of pleading, see Or. 23, r. 1; through failure to give notice of trial, see Or. 30, r. 7.

ORDER XII.

SUMMONS FOR DIRECTIONS.

Summons for directions.
Or., E. Or. 30, r. 1.

1. Any party to an action may, at any time after the appearance of any defendant who is affected thereby, take out a general summons for directions.

The summons shall specify the matters as to which directions are desired, and shall be addressed to and served upon all such parties to the action as may be affected thereby.

As to authority for applications for directions being heard in Chambers, see *Jud. Act*, sec. 16; and by a State Judge; *ib.*, sec. 17. This order applies only where an appearance has been entered by a defendant.

As to application by party to whom summons is addressed for directions as to interlocutory proceedings; *vide*, r. 5, *infra*. The summons must be served two clear days before the return day thereof; Or. 40, r. 5. Any subsequent application shall be made by summons, which shall be set down for further hearing on two days' notice; r. 6, *infra*. The fee payable on sealing a summons for directions is 5s.; Rule of Court 6th October, 1903.

The above rule, like that formerly in force in Victoria, is permissive. Under the present Victorian r. 1, Or. 30, it is obligatory, as in England, to take out a summons for directions. The cases decided under both rules, however, are here quoted, but the decisions under the former Victorian rules must not be taken as indicating the present Victorian practice.

OBJECT OF SUMMONS.—A general summons for directions is the proper way to raise all matters between the parties. Under it any matter can be brought under the notice of the Judge up to the time of trial; *Nicholson v. Roff*, 6 A.L.T., 203. It should be taken out in all cases, and a party taking out a special summons for a matter which might have been included in a general summons will have to pay the costs occasioned by it; *Laffy v. Dougharty*, 6 A.L.T., 251; *Forsyth v. President, &c., of the Shire of Dundas*, 7 A.L.T., 45; *Australian M. L. F. Co. Ltd. v. London Chartered Bank*, 7 A.L.T., 65; *Nicholls v. Crispe*, 8 A.L.T., 1; *Watkins v. Whiting*, 8 A.L.T., 11; *Danby v. Mayor of Melbourne*, 27 V.L.R., 413. See also r. 6, *infra*, and Victorian practice thereunder, and r. 7, *infra*. The object of the order was to prevent costs by holding out an inducement to the taking out of an omnibus summons at the earliest possible stage of the action; *Caron v. Caron*, 8 A.L.T., 65. On the return of a summons for directions the parties should, as far as possible, attend with their respective cases reasonably prepared so that all points arising, or which may be likely to arise in the proceedings, should be dealt with on the first application. Any subsequent application will be at the risk of the party applying as to costs; *Dunkley v. Hill*, 22 A.L.T., 139.

FAILURE TO APPEAR AT HEARING.—Where the plaintiff takes out a summons for directions in an action to which the defendant has entered an appearance, and at the hearing of the summons for directions the defendant does not appear, the proper order to make is to direct the defendant to deliver his defence within a limited time, and otherwise to adjourn the summons; *Twomey v. Walsh*, 27 V.L.R., 723.

2. Upon the hearing of the summons, the Court or Justice shall, so far as practicable, make such order as is just with respect to all the interlocutory proceedings to be taken in the action before the trial, and as to the costs of such proceedings, and more particularly with respect to the following matters:—Pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, examination of witnesses, place and mode of trial.

Interlocutory proceedings.
Ct., E. Or. 30,
r. 2.

The operation of these Rules with respect to proceedings to be taken as to any matters particularly specified in this rule is subject to any direction given upon the summons for directions; r. 8, *infra*. The Justice may thus modify the Rules by an order made on the hearing of the summons. As to pleading, see Or. 14, *et seq.*; as to particulars, see Or. 15; as to admissions, see Or. 27; as to discovery, see Or. 26; as to inspection, see Or. 26; as to examination of witnesses, see Or. 31; as to place and mode of trial, see Or. 30.

STRIKING OUT PLEADING.—Holroyd, J., stated in *Smith v. President &c. of the Shire of St. Arnaud*, 8 A.L.T., 53, that he did not know of any authority for taking an application to strike out pleading under a general summons for directions.

In *Milson v. Strickland*, 8 A.L.T., 90, Higinbotham, C.J., remarked: "It (Or. XXX., r. 1) applies to all proceedings previous to trial. Every application previous to trial can be taken under a general summons for directions. I certainly think an application to strike out a pleading can be brought under a general summons."

INTERROGATORIES AND DISCOVERY.—Under the repealed Victorian Order 30, it was held that applications for leave to deliver interrogatories and for discovery of documents ought to be made on the general summons for directions: *Weigall v. Macpherson*, 6 A.L.T., 250; *Australian M. L. F. Co. Ltd. v. London Chartered Bank*, 7 A.L.T., 65. The Victorian Judges decided that applications of this nature when not brought under a general summons for directions should be made *ex parte*, and that a special summons ought not to be taken out; *Weigall v. Macpherson*, 6 A.L.T., 250; *Watson v. Watson*, 7 A.L.T., 139; *Crowther v. Robb*, 8 A.L.T., 23. Application was made by summons for directions, on behalf of the defendant, for discovery and interrogatories. The summons was granted, the interrogatories not to be delivered until after the discovery was made, which was to be done within fourteen days; *Davey v. Harcourt*, 7 A.L.T., 73.

Since the new rules were passed it has been held that where upon a summons for directions taken out by the plaintiff an order was made (*inter alia*) to the effect that the plaintiff and defendant be mutually at liberty to deliver interrogatories, there need be no service of the order for interrogatories by the defendant on the plaintiff; *Johnston v. The Equitable L. A. Socy. of the U. S.*, 28 V.L.R., 75. It has been held that no affidavit is necessary upon which to base an application for discovery and inspection of documents before delivery of a statement of claim, but the Judge in granting such application may act upon the facts as stated by counsel from their instructions; *Smith v. New Dempsey's G.M. Co.*, 29 V.L.R., 100.

EXAMINATION OF WITNESSES.—On a summons for directions a plaintiff, who after the issue of a writ left Queensland with her husband to reside permanently in England, was on her own application granted an order that she and another witness might be examined in Sydney before an examiner; *Stenger v. Mathias* (1903), Q.W.N., 46.

A general summons taken out on behalf of plaintiff, asked for leave to deliver interrogatories, and for a commission to examine witnesses abroad, and for further directions. On the hearing of the summons it was intimated that the interrogatories were not required, and that the only question was the issue of the commission, which the Judge refused and dismissed the whole summons. On appeal it was held that the Judge was right in dismissing the whole summons; *Rismundo v. Rismundo*, 12 V.L.R., 101.

MODE OF TRIAL.—The Victorian rule means that the party who desires a jury indicates such desire at the stage of summons for directions and does not in any way alter the rights of the parties; *Josephs v. Cole*, 28 V.L.R., 719.

As to power of Court or Justice to order a trial with a jury, see H.C.P. Act, sec. 12, Or. 30, r. 2.

Adjournment.
Q. Or. 20, r. 3.

3. The further hearing of the summons shall be adjourned from time to time until the conclusion of the action.

As to subsequent applications, see rr. 6, 7.

4. No affidavit shall be made or used on the hearing of the summons except by special order of the Court or Justice. No affidavit necessary.
Cf., E. Or. 30, r. 3.
5. On the hearing of the summons, any party to whom the summons is addressed shall, so far as practicable, apply for any order or directions as to any interlocutory matter or proceeding in the action which he desires. Parties to apply for directions.
Cf., E. Or. 30, r. 4.
6. When such a summons has been taken out, any application subsequent to the first hearing of the summons for any directions as to any interlocutory matter or proceeding by any party shall be made under the summons, which shall be set down for further hearing on two clear days' notice to the other party, stating the nature of the order or directions intended to be asked for. Subsequent applications.
Cf., E. Or. 30, r. 5.

As to adjourning the hearing of the summons from time to time, see r. 3, *supra*.

The practice of the Court in Victoria under Or. XXX. (1900), r. 5, the corresponding rule, has thus been stated by A'Beckett, J. :—"I have been asked in this Court by counsel to state the views of the Bench as to the proper practice under rule 5 of Order 30. It is a small matter, but there is doubt in the profession as to the mode of applying thereunder. Supposing an order for directions has been made directing interrogatories or particulars to be delivered, and then the answers to the interrogatories are insufficient or the particulars defective, it has been said in such cases that the more convenient course is to apply by an ordinary summons, instead of interposing the delay occasioned by the two days' notice required under rule 5. The construction which has been put upon this rule by the Bench is that it would be unnecessary, in such cases as I have mentioned, to give the two-days' notice; the parties may apply by summons, and this direction in the rule is only to apply as to matters which might have been included in the original summons for directions. I state now, after consultation with other members of the Bench, that this may be accepted as the correct practice, and that these matters and matters of this sort may be brought before the Court by way of summons. Speaking for myself, supposing the notice had been given instead of the summons being taken out, I should not refuse to deal with it on that account." *In re A.B.*, 27 V.L.R., 128. The summons for directions should be entirely disposed of by the Judge who hears it, and should not be adjourned unless it exhibits some complications. If it be not so adjourned any further applications for directions by any party should be by notice and not by summons, and need not necessarily be made to the Judge who heard the summons for directions;" *Melbourne and Metropolitan Board of Works v. Melbourne T. & O. Co. Ltd.*, 27 V.L.R., 174.

7. Any application by any party which might have been made at the first hearing of the summons shall, if granted on any subsequent application, be granted at the costs of the party applying, unless the Court or Justice is of opinion that the application could not properly have been made at the first hearing of the summons. Costs of subsequent application.
Cf., E. Or. 30, r. 6.

As to costs, see note to r. 1, *supra*.

Effect of order.
Q. Or. 20, r. 3.

8. The operation of these Rules with respect to the proceedings to be taken by the parties as to any of the matters particularly specified in Rule 2 of this Order shall be subject to any directions given upon the summons for directions.

The matters specified in rule 2 are :—Pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real and personal property, examination of witnesses, place and mode of trial.

ORDER XIII.

TRIAL WITHOUT PLEADINGS.

Indorsement.
Ct., E. Or. 18a,
r. 1.

1. When the indorsement of the writ of summons in an action contains a statement sufficient to give notice of the nature of the plaintiff's claim or of the relief or remedy sought in the action, the plaintiff may also indorse on the writ a notice stating that if the defendant appears the plaintiff intends to proceed to trial without pleadings.

As to indorsement of writ of summons, see Or. 4; as to power of Court or Justice to direct trial of issues, see H.C.P. Act, secs. 13, 14; as to trial of questions of law and of fact without pleadings, see Or. 29.

Notice of trial.
Ct., E. Or. 18a,
rr. 2, 6.

2. When the writ is so indorsed, no pleadings shall be required or delivered, except by order of the Court or a Justice; and the plaintiff may, at the expiration of ten days after appearance, serve notice of trial without pleadings.

As to computation of time limited by this rule, see Or. 45; as to notice of trial generally, see Or. 30, r. 7, *et seq.*

In Victoria a corresponding rule was held to apply only to cases where an appearance had been entered by the defendant, and that where there was no appearance to a writ claiming specific performance, and which was indorsed with notice that if the defendant appeared the plaintiff intended to proceed to trial without pleadings, that the plaintiff's proper course was to file a statement of claim and proceed as directed by Or. 13, r. 12 (Vic.); *Machin v. Edwards*, 27 V.L.R. 134 (Hood, J.) In Queensland, Griffith, C.J., held that where the writ is indorsed for trial without pleadings, the action must go to trial and cannot be set down on motion for judgment; *Allen v. Allen*, 1902 S.R. (Q.), 306.

Defendant may
apply for
statement of
claim.
Ct., E. Or. 18a,
r. 3.

3. When the writ is so indorsed, the defendant may, within ten days after appearance, apply to a Justice for an order for the delivery of a statement of claim, and on such application the Justice may order that a statement of claim shall be delivered, in which case the action shall proceed as if no such indorsement had been made; or may order that the action shall proceed to trial without pleadings. In the latter case, the Justice may, if he thinks fit, further order that either party shall deliver particulars of his claim or defence within a time to be specified in the order.

As to raising special defences, see r. 5, *infra*; as to particulars, see r. 4, *infra*, and Or. 15; as to statement of claim, see Or. 16; as to discovery, see note to Or. 26, r. 8.

4. If the Justice orders that the action shall proceed to trial without pleadings, and makes no order as to particulars, all defences shall be open at the trial to the defendant. Particulars.
Cf., E. Or. 18a,
r. 4.

When particulars are ordered to be delivered, the parties shall be bound by the particulars so far as regards the matters in respect of which the order for particulars is made.

As to notice of special defences, see r. 5, *infra*; as to particulars, see Or. 15.

5. When the writ is so indorsed, and the defendant does not make application under Rule 3 of this Order, he shall not be allowed to rely on a set-off or cross-claim, or on the defence of infancy, coverture, fraud, a Statute of Limitations or discharge under the laws relating to bankruptcy or insolvency, unless within ten days after appearance he gives notice to the plaintiff, stating the defence upon which he so relies, and, in the case of a set-off or cross-claim, or of the defence of fraud, giving particulars thereof; but all other defences shall be open at the trial of* the defendant. Special defences.
Cf., E. Or. 18a,
r. 5.

If the plaintiff sets up in reply to a set-off or cross-claim any such defence as hereinbefore enumerated, he shall give like notice thereof to the defendant before giving notice of trial.

As to pleading by way of set-off and cross-action, see Or. 14, r. 3.

* The word "of" is a misprint; see corresponding rule in Queensland, Or. 21, r. 5.

ORDER XIV.

PLEADING GENERALLY.

1. Every pleading shall contain a statement, as brief as the nature of the case allows, setting out the material facts on which the party pleading relies to support his claim or defence, as the case may be, but not the evidence by which they are to be proved; and shall, when necessary, be divided into paragraphs, numbered consecutively, and each containing, as nearly as may be, a separate allegation. Dates, sums, and numbers may be expressed in figures or in words. Every pleading shall be signed by the solicitor of the party, or by the party himself if he sues or defends in person. Pleading to
state material
facts and not
evidence.
Costs of prolix
pleadings.
Cf., E. Or. 19,
rr. 2-4.

The Court or a Justice in adjudging the costs of the action shall at the instance of any party, and may without any request, inquire into any unnecessary prolixity, and may order the costs occasioned by the prolixity to be borne by the party responsible for it.

No pleading is defective on technical ground of want of form ; r. 28, *infra*. Where further particulars are necessary the Court or Justice may order them, see Or. 15 ; as to statement of claim, see Or. 16 ; defence or cross-claim, see Or. 17 ; reply and subsequent pleadings, Or. 19 ; matters pending action, Or. 20 ; demurrer, Or. 21 ; default in pleadings, Or. 23 ; amendment, Or. 24 ; H.C.P. Act, ss. 23, 24 ; as to pleading to a return to a writ of mandamus, see Or. 41, r. 21 ; pleadings in prohibition, Or. 41, r. 27 ; as to information of *quo warranto* and defence and subsequent proceeding, see Or. 41, r. 34, *et seq.* Paragraphs containing evidence may be struck out ; see note to r. 31, *infra*.

MATERIAL FACTS.—The statement of claim should contain the material facts ; *Rudduck v. Clarke*, 6 A.L.T., 45. The precise nature of a representation alleged to be fraudulent is a material fact, which should not be omitted from the statement of claim ; *Desailly v. Ham*, 6 A.L.T., 21. In a statement of claim for the recovery of a statutory penalty, it is not necessary to allege that the act was done *contra formam statuti* ; *Attorney-General v. Syme*, 11 V.L.R., 544. The question of whether an agreement is in writing or not is a material fact, and, as such, ought to be set out ; *Coldwell v. Hehir*, 11 A.L.T., 57 ; *Cuttance v. Thompson*, 10 A.L.T., 40. A pleading in the form indicated by Rules of Court is good, however, even though, in alleging a contract, it fails to set forth whether the contract was verbal or written. Particulars of these facts will, however, be ordered to be given ; *O'Day v. Reid & Co. Ltd.*, 24 V.L.R., 67. Matters which go merely to the question of costs are not material facts for pleading ; *Ricketts v. Fraser*, 8 A.L.T., 21 ; *Sundercombe v. Stubb*, 15 V.L.R., 509. It is not sufficient that the allegation of a material fact may be inferred from the heading of the writ. Such a fact must be pleaded in the statement of claim itself ; *Bostock v. Edgar*, 24 V.L.R., 677. A statement of claim alleging negligence on the part of a defendant discloses no cause of action unless it also alleges a duty owing by the defendant to the plaintiff, and a breach thereof ; *Cotter v. Buchanan*, 2 A.L.R., 301. As to two defendants being sued in respect of same tort in one action, see *Mendoza v. Mayor &c. of Melbourne and the Metropolitan Board of Works*, 22 V.L.R., 611. If a gift is relied on the motive of the giver is not a material fact. The mere circumstance that certain facts make it probable that a gift would be made does not make them material facts ; *McNaughton v. Chirnside*, 19 A.L.T., 121. In a suit brought to impeach a grant from the Crown, the claim must set out a distinct ground of forfeiture as a foundation of its prayer ; *Attorney-General v. Goldsmith*, 15 V.L.R., 638. A paragraph in a claim will not be allowed to stand because it is, or might be, a material statement with reference to an application proposed to be made for an interlocutory judgment ; *Florins v. The Bank of Victoria*, 17 V.L.R., 183. Where a plaintiff's claim was for money lent and interest, and the statement of claim did not show that the lending was in Victoria, or that the repayment was to be made in Victoria, it was held the statement of claim was sufficient, and it lay on the defendant, if it was part of the answer that the contract was made or to be performed out of the country, to allege that fact ; *Morrison v. N. Z. L. & M. A. Co. Ltd.*, 22 V.L.R., 209 ; (1899) A.C., 349. In an action against a shire council for misfeasance it is necessary in Victoria for the plaintiff to allege that he is a ratepayer or a councillor, or has an interest in the shire ; *Dobson v. Shire of Ferntree Gully*, 17 V.L.R., 606. In Victoria it would appear that a plaintiff who sues a married woman must allege in his statement of claim that the defendant had separate property at the time the contract sued upon was made ; *Freehold I. & B.*

Co. of Australia Ltd. v. Mercer, 17 A.L.T., 40. Where a defendant is sued in the writ in a representative capacity the statement of claim should allege that he is sued in such capacity; *Renwick v. Robertson*, 20 V.L.R., 165.

As to what allegations are necessary in an action against trustees for wilful default, see *Hutchings v. Snowden*, 23 V.L.R., 118.

In an action for oral defamation, the defendant pleaded facts excusing the publication, using the words of sub-secs. 3, 4, 5 of sec. 17 of the Defamation Law of Queensland, but without giving any further details, it was held that the defence was properly pleaded; *Sharpe v. Woolley*, 9 Q.L.J., 175. Cf., *Smith v. Musgrove*, 11 V.L.R., 440. Inconsistent defences may be pleaded together; *Buyolich v. Vreenderberg*, 9 A.L.T., 1; *Coldwell v. Hehir*, 11 A.L.T., 57. A statement in a defence in an action for wrongs that the alleged injuries were occasioned by a certain instrument, and that the defendant had not the care and management of or any property in such instrument, is not only an allowable, but a very proper defence to put on the record; *Blackburn v. Mayor of Melbourne*, 6 A.L.T., 154. In pleading the defence of lien it is not necessary for the defendant to set out all matters necessary to constitute such defence; *Bishop v. Gardiner*, 21 V.L.R., 750. It would appear that the absolute assignment of a debt, followed up with proper notice, affords, under the *Judicature Act* (Vic.), a good defence to an action brought by the assignor; *Bacon v. Yatchaw Irrigation and Water Supply Trust*, 23 V.L.R., at p. 488.

Where in an action the statement of defence, which had been drawn by the defendant, a foreigner, in person, was not divided into paragraphs, nor indorsed as required by the Rules, and contained other irregularities, but, nevertheless, showed a substantial defence, the technical objection was set aside, and the case was allowed to go to trial; *Queensland Piano and Warehouse Co. v. Kenig*, *Queensland Dig.*, col. 203.

2. Except in cases in which no pleadings are required the plaintiff shall, at the time and in the manner prescribed by Order XVI., deliver to the defendant a statement of his claim, and of the relief or remedy to which he claims to be entitled. The defendant shall, at the time and in the manner prescribed by Order XVII., deliver to the plaintiff his defence, if any; and the plaintiff shall, at the time and in the manner prescribed by Order XIX., deliver his reply, if any, to the defence.

Delivery of pleadings.
Ct., E. Or. 19, r. 2.

As to the way in which pleadings should be delivered, see r. 7, *infra*; as to the times for delivering a statement of claim, see Or. 16, r. 4; of defence or cross-claim, Or. 17, rr. 6, 7; of reply, Or. 19, r. 1. No delivery of pleadings allowed in vacation; see Or. 45, r. 3. For power of Court to enlarge or abridge the time, *ib.*, r. 6.

3. A defendant may plead by way of set-off, or set up by way of cross-action, against the claim of the plaintiff or any of the plaintiffs, if more than one, any right or claim arising out of the plaintiff's claim or connected with it, whether the set-off or cross-claim sound in damages or not; and the set-off or cross-claim shall have the same

Set-off and cross-action.
Ct., E. Or. 19, r. 3.

effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original claim and on the cross-claim. But the Court or a Justice may strike out a defence by way of set-off or cross-claim, if in the opinion of the Court or Justice the set-off or cross-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, or may order that it shall be disposed of separately.

As to right of cross-action, see *Jud. Act*, sec. 32. As to reliance on distinct grounds of cross-claim, r. 4. As to statement of reliance by defendant upon facts or circumstances in pleadings establishing a right of cross-action, see Or. 17, r. 9. As to answer by way of cross-action, see Or. 17, r. 10. As to judgment for balance, see Or. 17, r. 11. As to pleading matters arising pending action, see Or. 20.

When the Crown proceeds by way of information under the provisions of the *Crown Remedies and Liability Act* 1890 (Vic.), a subject is entitled to plead a defence by way of set-off against the claim of the Crown as if the matter were a civil action between subject and subject; *The Queen v. Officer*, 20 V.L.R., 187.

Relief founded
on separate
facts.

E. Or. 20, r. 7.

4. When the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct grounds, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where a defendant relies upon several distinct grounds of defence or cross-claim founded upon separate and distinct facts.

As to several defences, see r. 12, *infra*.

Particulars to be
given in certain
cases.

Cf., E. Or. 19, r.
6.

5. If the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars are necessary, particulars, with dates and items if necessary, shall be stated in the pleading: Provided that, if the particulars are of debt, expenses, or damages, and exceed three folios, the fact shall be so stated, with a reference to full particulars already delivered or to be delivered with the pleading.

As to giving further particulars, see Or. 15.

This rule is imperative as to the insertion of particulars when fraud and misrepresentation are alleged; *Vail v. Gilmour*, 6 A.L.T., 168.

Where a pleading alleging a balance due did not state by what means that balance was arrived at, such pleading was ordered to be struck out as embarrassing. *Paterson v. Clorton*, 7 A.L.T., 15.

Printing
pleadings.

Cf., E. Or. 19,
r. 9.

Delivery by
filing.

E. Or. 19, r. 10.

6. Pleadings may be either printed or written, or partly printed and partly written.

7. Every pleading or other document required to be delivered to a party, or between parties, shall be delivered at the address for service, to the solicitor of every party who sues or appears by a solicitor, or to the party if he does not sue or appear by a solicitor;

but if no appearance has been entered for any party, then the pleading or document shall be delivered by being filed in the Registry.

As to indorsement of address for service on originating proceeding and on memorandum of appearance, see Or. 1, rr. 3, 4; Or. 9, rr. 3, 4. As to service when no appearance or no address for service, Or. 47, r. 6. As to service of documents generally, see Or. 47.

The fee payable on filing a pleading required to be delivered when no appearance entered is 2s. 6d.; Rules of Court, October 6th, 1903.

8. Every pleading shall be marked on the face with the number of the action, the title of the action, the date of the day on which the pleading is delivered and the description of the pleading, and shall be indorsed with the name and address for service of the solicitor and agent, if any, delivering it, or the name and address for service of the party delivering it if he does not sue or appear by a solicitor.

Marking pleadings.
E. Or. 19, r. 11.

As to the title of proceedings, see Or. 1, r. 2; as to title of actions, see Or. 4, r. 5; as to title of writ of summons, see App. No. 1; as to address for service, see Or. 1, rr. 3, 4.

9. The defence of "Not guilty by statute" shall not be used.

Plea of "Not guilty by statute" not to be used.

10. Every allegation of fact in any pleading, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant or a person of unsound mind.

Cf., E. Or. 19, r. 12.
Specific denial.
E. Or. 19, r. 13.

As to general denial, see r. 15, *infra*; as to effect of general denial, see r. 18, *infra*, and effect of denial of contract, r. 19, *infra*; when denials in defence, see Or. 17, rr. 1-5.

11. An averment of the performance or occurrence of all conditions precedent necessary for the case of either party shall be implied in his pleading: And when the performance or occurrence of any condition precedent is denied, the condition must, unless it appears already by implication, be distinctly specified in his pleading by the party denying it.

Conditions precedent to be specified by party denying performance.
Cf., E. Or. 19, r. 14.

This rule does not apply to statements forming part of the cause of action. It refers merely to conditions precedent to the right to recover; *Freehold Invest. Co. v. Mercer*, 17 A.L.T., 40.

12. Any party may, without leave, plead any number of separate defences or other replies or answers to the previous pleading of the opposite party.

Several defences or answers.
Q. Or. 22, r. 13.

As to pleading distinct grounds of defence, see r. 5, *supra*.

13. Each party must raise by his pleading all matters of fact which show that the claim of the opposite party is not maintainable, or that a transaction is void or voidable in point of law; and all

Pleadings to raise all grounds of defence or reply.
Cf., E. Or. 19, r. 15.

grounds of defence or reply, as the case may be, must be pleaded which, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, lease, payment, performance, facts showing illegality or invalidity of a contract either by statute or common law, or a Statute of Limitations.

As to payment into Court before or at the time of delivering defence, see Or. 18.

MATTERS.—All matters which show a claim not to be maintainable must be set out in the defence, either by stating them as matters of fact, or by objecting on a point of law; *Nicholson v. The Colonial Mutual Ins. Co.*, 13 V.L.R., 58.

Where a party intends to rely on previous dealings between the parties to add an implied term to a written contract, he must set it out in his pleadings; *Upton v. Chipman*, 13 A.L.T., 239.

ILLEGALITY OF CONTRACT.—A defendant in an action to establish a partnership who wishes to rely on the illegality of the partnership, the nature of which appears by the statement of claim, must plead it; *Hill v. Stewart*, 13 V.L.R., 74. In Queensland it was held that the defence of illegality of a contract under *The Suppression of Gambling Act* must be specially pleaded, and where no application had been made to amend his pleading during the trial, that the defendant ought not to be allowed to take the benefit of the defence on a motion for judgment; *Campbell v. Riley*, 9 Q.L.J. (N.C.), 124.

STATUTE OF LIMITATIONS.—These words in a corresponding Victorian rule were held to mean a Statute by which a remedy is barred after a certain time and not a Statute which extinguishes a right; *Pearson v. Russell*, 9 A.L.T., 2.

Departure.
E. Or. 19, r. 16.

14. A pleading shall not raise any new ground of claim, or contain any allegation of fact, inconsistent with the previous pleadings of the party pleading it.

A plaintiff cannot in his reply set up a new cause of action; *Warnock v. Victorian Railway Commissioners*, 7 A.L.T., 54; *Angus v. Jenkins*, 14 V.L.R., 117. He is entitled to reply by traverse or confession and avoidance, but he cannot set up in his reply a new cause of action altogether on a different state of facts, even although that new cause might have been pleaded in the alternative in the statement of claim. He cannot, in his reply, allege facts which contradict and are inconsistent with facts set out in the statement of claim; *Green v. Hoyme*, 14 V.L.R., 220. A reply which is inconsistent with a former pleading and constitutes a departure will be struck out; *White v. Derwent and Tamar Ins. Co.*, 14 V.L.R., 642.

A plaintiff stated in a reply to a plea by the defendant of the Statute of Limitations that she was beyond seas when the defendant took possession. Held that the paragraph was bad; *Pearson v. Russell*, 9 A.L.T., 2.

In *Henderson v. Thorne*, 16 A.L.T., 193, it was held that where a plaintiff sets up a verbal contract for the sale of land and the defendant raises the Statute of Frauds in the defence, the plaintiff in his reply can set up a memorandum in writing sufficient to satisfy the Statute.

15. It is sufficient for a defendant in his statement of defence to deny generally any allegations in the statement of claim. General denial.
Ct., E. Or. 19,
r. 17.

As to specific denial, see r. 10, *supra*; effect of denial, see rr. 18, 19, *infra*; denial in defence, see Or. 17; rr. 1-5.

16. When a party admits any allegation in the pleading of the opposite party, and sets up other matter in answer thereto, he must, unless he amends his pleading, plead the other matter specifically in a further pleading. Confession and
avoidance.
Q. Or. 22, r. 17.

As to amendment of pleadings, see Or. 24.

17. Either party may, in any pleading subsequent to defence, join issue upon the last preceding pleading of the opposite party. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party is willing to admit, and shall then operate as a denial of the facts not so admitted. Joinder of issue.
Ct., E. Or. 19,
r. 18.

As to time for joinder of issue, see Or. 19, r. 3; as to effect of joinder of issue, Or. 19, r. 4.

A party cannot join issue and plead matters which would be comprised in the joinder of issue; *Hearty v. Gillespie*, 6 A.L.T., 265. Where a reply raises an objection at law, a joinder of issue on such objection is unnecessary; *Bancroft v. Mayor of South Melbourne*, 8 A.L.T., 89. Where the defendant raises a set-off in his defence, and not by way of counter-claim, the plaintiff, if he has no new matter to plead which would be likely to take the opposite party by surprise or to raise issues of fact not arising out of the preceding pleadings, is at liberty to join issue on the defence, and such joinder operates as a denial of every material allegation of fact in the statement of defence; *Reynolds v. Taylor*, 8 A.L.T., 13.

18. Subject to the next following Rule and to Order XVII., a general denial of an allegation of fact in a previous pleading shall be construed as a denial of the allegation, and of all the alleged circumstances, whether of time, place, amount, or otherwise. Effect of general
denial.
Ct., E. Or. 19,
r. 19.

As to specific denials, see r. 10, *supra*; general denial, r. 15, *supra*; effect of denial of contract, r. 19, *infra*; denial in defences, Or. 17, rr. 1-5.

19. When a contract, promise, or agreement, is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of the contract, promise, or agreement, whether with reference to any Act, or otherwise, or of the authority of any person by whom the contract, promise, or agreement, is alleged to have been made. Effect of denial
of contract.
Ct., E. Or. 19,
r. 20.

As to the effect of a failure to specially plead illegality of a contract, see *Campbell v. Riley*, 9 Q.L.J. (N.C.), 124.

Effect of documents to be stated.

E. Or. 19, r. 21.

20. When the contents of a document are material, it is sufficient to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

As to setting out document at length in demurrer, see Or. 21, r. 6.

Malice, knowledge, &c.
E. Or. 19, r. 22.

21. When it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it is sufficient to allege the same as a fact without setting out the circumstances from which it is to be inferred.

Notice.
E. Or. 19, r. 23.

22. When it is material to allege notice to any person of any fact, matter, or thing, it is sufficient to allege the notice as a fact, unless the form or the precise terms of the notice, or the circumstances from which such notice is to be inferred, are material.

Implied contract or relation.
E. Or. 19, r. 24.

23. When any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it is sufficient to allege the contract or relation as a fact, and to refer generally to the letters, conversations, or circumstances, without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from the circumstances, he may state them in the alternative.

Stated or settled account to be alleged.
Cf., E. Or. 20, r. 8.

24. When the cause of action is a stated or settled account, the same must be alleged with sufficient particulars, but when a statement of account is relied on by way of evidence or admission of some other cause of action which is pleaded, the same shall not be alleged in the pleadings.

As to not pleading evidence, see r. 1, *supra*.

Presumptions of law.
E. Or. 19, r. 25.

25. A party need not in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof does not lie upon him, unless it has first been specifically denied by the other party: for example, the consideration for a bill of exchange when the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.

If a plaintiff belongs to a limited class who alone are entitled to invoke the aid of the Court, he must allege he is one. If the defendant alleges the plaintiff is one of limited class disqualified from seeking it, he must allege it. *Leahy v. Lemel*, 8 Q.L.J., 19.

Points of law may be raised by pleadings.
Cf., E. Or. 25, r. 2.

26. Any party may raise by his pleading any point of law, and any point so raised shall, if not previously disposed of, be disposed of by the Justice who tries the action, at or after the trial: Provided that by consent of the parties, or by order of the Court or a Justice, made on

the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

As to dismissal of action, see r. 27, *infra* ; as to disposal of questions of law on demurrer, see Or. 21 ; as to special case on questions of law, see Or. 29. Where questions of law are raised upon the pleadings, a Judge may, before the trial of the issues of fact, order that the questions of law be referred to the Full Court ; *Lane v. Casey*, 12 V.L.R., 380. In such case the plaintiff should commence, and has in every instance the right of reply. *Quere*, whether the argument must not be confined to the points raised on the pleadings ; *National Bank v. Morrow*, 13 V.L.R., 2. Where a defendant raises, in answer to the plaintiff's statement of claim, a point of law which is set down for argument, the defendant has the right, on that argument, to begin ; *The Attorney-General v. Jules Renard & Co.*, 20 A.L.T., 272. Points of law raised in the defence were ordered to be tried before the trial of the action in *Graham v. Haig*, 6 A.L.T., 153.

An application for an order to hear the points of law before the trial of the facts was refused where the questions of law were in the main dependent upon controverted allegations of complicated facts ; *Wilkinson v. Mulcahey*, 9 A.L.T., 135. An application should not be made to strike out paragraphs of a defence where they raise debatable points of law. The proper procedure is to raise the question of law in the reply, and apply to have the question of law set down for hearing before the trial ; *Healey v. Bank of N. S. W.*, 24 V.L.R., 405. Cf., *New Zealand and Australian Land Co. v. McIntyre*, 11 Q.L.J., 3. Questions of law arising on election petitions, were referred by Griffiths, C.J., to the Full Court of the High Court, in the cases of *Chanter v. Blackwood*, *Maloney v. McEacharn*, and *Hirsch v. Phillips*, 1 C.L.R.

27. If in the opinion of the Court or Justice the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, claim of damages, ground of defence, set-off, or cross-claim therein, the Court or Justice may thereupon dismiss the action or give or make such other judgment or order therein as is just.

Dismissal of action.
Cf., E. Or. 25, r. 3.

28. No technical objection shall be made to any pleading on the ground of any alleged want of form.

Technical objection.
E. Or. 19, r. 26.

As to amendment of defects or errors, see H.C.P. Act, sec. 23. No proceedings in High Court to be invalidated by formal defect or irregularity ; see H.C.P. Act, sec. 24. As to setting aside proceedings for irregularity, see Or. 49, r. 6.

29. When a judgment is pleaded the party pleading must, within ten days after demand by the opposite party, deliver to him a copy of the judgment, certified by the proper officer of the Court by which the judgment was given. In default of such delivery, the Court or a Justice may order the pleading to be struck out or amended.

When judgment pleaded.
Q. Or. 22, r. 30.

As to computation of the time limited by this Rule, see Or. 45.

30. The Court or a Justice may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or

Striking out pleading where no reasonable

cause of action
or defence
disclosed.

Cf., E. Or. 19,
r. 27.

E. Or. 25, r. 4.

ground of defence, or that it shows that the action or defence is frivolous or vexatious; and in any such case the Court or a Justice may order that the action be stayed or dismissed, or that judgment be entered as upon default of pleading, as may be just.

See r. 31, *infra*, and notes thereto.

REASONABLE CAUSE OF ACTION.—The object of this rule was to get rid of frivolous actions, and therefore where a statement of claim discloses no reasonable cause of action the proper course is to apply under this rule; *Weedon v. Peck*, 11 A.L.T., 94. Cf. also, *Barker v. Sands & McDougall*, 16 V.L.R., 719; *Sheppard v. Prince of Wales, &c., Co.*, 17 A.L.T., 38; *Coller v. Buchanan*, 2 A.L.R., 301; *Florins v. The Bank of Victoria Ltd.*, 17 V.L.R., 183. An objection to a writ is the nature of a plea to the jurisdiction ought to be taken by demurrer and plea and should not be decided on a summary application. The use of the expression “reasonable cause” shows that the summary procedure is only intended to be had recourse to in plain and obvious cases; *New Zealand and Australian Land Co. v. McIntyre*, 11 Q.L.J., 3. Cf., *Healey v. Bank of N.S.W.*, 24 V.L.R., 405; *Wall v. Bank of Victoria*, 16 V.L.R., 2. The Court will not on a summary application decide matters which may be matters of substance, or objections which according to the rules of pleading under the *Judicature Act* ought to be pleaded by the defence; *Tyler v. Tyler*, 13 V.L.R., 657. Where a pleading is intelligible in itself application should not be made to strike it out on the ground that it discloses no reasonable answer. Such objections should be taken in the reply; *Smith v. President &c., of the Shire of St. Arnaud*, 8 A.L.T., 53.

• **VEXATIOUS ACTION.**—F. sued D. for libel in the County Court but failed to prove the alleged libel and was nonsuited with costs. He appealed, but the ruling of the Court below was upheld. He then commenced a second action in the County Court which was stayed until he should pay the costs of the former action. He neglected to pay the costs, and subsequently commenced a third action in the Supreme Court suing *in forma pauperis*. The dismissal of the action on the ground of being vexatious was upheld on appeal; *Foran v. Derrick*, 14 A.L.T., 284.

Where the subject matter of an action, even if not strictly *res judicata*, has been so dealt with in former actions that, under the circumstances, it would be inequitable to allow it to be again raised, the Court in the exercise of its inherent jurisdiction to prevent oppression will stay the action; *Merry v. Fraser*, 5 A.L.R., 5. A defect of parties may constitute a ground for summarily staying an action where the Court is satisfied that by no possible amendment can the plaintiff add parties against whom the action would be maintainable; *ib.*

Striking out
pleadings in
other cases.

E. Or. 19, r. 27.

31. The Court or a Justice may at any stage of the proceedings order to be struck out or amended any matter in any pleading which is unnecessary or scandalous, or which tends to prejudice, embarrass, or delay the fair trial of the action; and may in any such case order the costs of the application to be paid as between solicitor and client.

As to striking out a defence by way of set-off or cross-claim, see r. 3, *supra*; at the request of a defendant the whole or part of his defence may be struck out; Or. 22, r. 3. Where demurrer allowed to part of pleading, that part deemed to be struck out; Or. 21, r. 11; as to amendment of pleading; Or. 24, r. 3, *et seq.*; H.C.P. Act, sec. 23.

Objection to statements in pleading on the ground that they are statements of evidence should be taken on summons to strike them out; *Miles v. McIlwraith*, 1 Q.L.J., 33. See also *Boyle v. Hamilton*, 5 S.C.R. (Q.), 88. Cf., *Florina v. The Bank of Victoria Ltd.*, 17 V.L.R., 183.

As to the practice in New South Wales with respect to striking out embarrassing pleadings, see *Rolin and Innes, Supreme Court Practice* (N.S.W.), p. 42.

The proper ground for striking out a pleading as embarrassing is that the pleading will embarrass the fair trial of the action; *Laffy v. Dougharty*, 6 A.L.T., 236. Application under this rule should not be made unless there is something in the pleading really embarrassing. The fact that a pleading may justly be subject to criticism is not sufficient to justify a summons under this rule; *Neville v. Hansen*, 21 A.L.T., 2. A paragraph in a reply which is not necessary will not be struck out if it is not also embarrassing, such paragraph being consistent with particulars delivered under a statement of claim, and having the effect of making the claim clearer; *The Wallace St. Arnaud G.M. Co. v. The Lord Nelson G.M. Co.*, 3 A.L.R., 212. Embarrassing pleas were struck out in *Jones v. Mullen*, 8 A.L.T., 167; *Lavelor v. Crisp*, 17 V.L.B., 372; but an application to strike out a counterclaim was refused in *P. & O. S. N. Co. v. Britnell*, 18 V.L.R., 580. Where a pleading is objectionable for want of form an application should be made to have it struck out; *Seyffarth v. Aulick*, 12 A.L.T., 11.

APPEAL.—The power to strike out being discretionary, there is no appeal unless a case is made out showing either inconvenience or injustice would ensue from allowing the decision of the Judge to stand; *Murphy v. Chandler*, 2 Q.L.J., 64.

32. Upon every pleading, except a joinder of issue or a demurrer, there shall be indorsed a notice requiring the opposite party to deliver his pleading in reply thereto within the prescribed time.

Notice to plead or set down demurrer.
Q. Or. 22, r. 33.

Upon every demurrer there shall be indorsed a notice requiring the party whose pleading is demurred to to set the demurrer down within ten days for argument.

As to demurrer, see Or. 21.

ORDER XV.

PARTICULARS.

1. The Court or a Justice may in any case order either party to deliver to the other a further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding, upon such terms, as to costs and otherwise, as are just.

Order for particulars.
Cf., E. Or. 19, rr. 6, 7.

As to particulars on summons for directions, see Or. 12, r. 2; as to delivery of particulars where judgment is sought without pleadings, see Or. 13, rr. 3, 4; as to delivery of particulars with pleading in certain cases, see Or. 14, r. 5.

TIME FOR APPLICATION.—Where the defendant requires better particulars he must apply promptly, and, if possible, before pleading; *Murnin v. United Assurance Co.*, 6 S.C.R. (N.S.W.), 262; *Taylor v. Port*, 6 A.L.T., 155. Applications should be made by the plaintiff, if the statement of defence is such as would entitle him to particulars, before he has delivered his reply. Applications for particulars after the party has pleaded will not be granted, unless under special circumstances; *Taylor v. Port*, 6 A.L.T., 155. Compare also, *Ford v. Holder*, 17 W.N. (N.S.W.), 67. In *Dudley v. Webb*, 14 V.L.R., 122, particulars were ordered after the plaintiff put in a reply to the statement of defence.

AFFIDAVIT IN SUPPORT.—On an application for particulars, the applicant should file an affidavit stating that the information sought is not within his own knowledge; *Cuttance v. Thompson*, 10 A.L.T., 40. When after a defence is delivered the defendant applies for further and better particulars, an affidavit in support of such application is necessary only for the purpose of showing that the discovery asked for is as to matters of which the party applying is ignorant. Hence when the particulars asked for related to a promise to marry the defendant was not required to file an affidavit in support of his application; *Hughes v. Logan*, 14 V.L.R., 647. Where a plaintiff suing as administratrix asked for particulars of a defence of contributory negligence she was not required to file an affidavit that she had no knowledge of the facts constituting the defence; *Hodgman v. Maxwell*, 9 A.L.T., 213. In an application for particulars in an action for a liquidated amount, an affidavit is not necessary stating that the information sought for is not within the applicant's own knowledge, but in actions for damages for a breach of contract or on a tort the Court has a discretion to require such an affidavit or not; *Colonial Finance Corporation Ltd. v. Gray*, 26 V.L.R., 386; *Dawson v. Swords*, 10 A.L.T., 255.

IN WHAT CASES PARTICULARS ORDERED.—The Court has general power to order particulars of a demand or defence to be given in a proper case; *Sharpe v. Woolley*, 9 Q.L.J., 175. Where a pleader follows a form given in an appendix, the pleading is good, but particulars may be ordered; *O'Day v. Reid*, 24 V.L.R., 67; *Coldwell v. Hehir*, 11 A.L.T., 57. The pleading omitted to state whether a contract was verbal or written; *Ib.* If a defendant sets up a defence of contributory negligence he may be ordered to give particulars of such defence; *Hodgman v. Maxwell*, 9 A.L.T., 213. The defence of contributory negligence in an action of assault is embarrassing, and the proper order to make is that the paragraph be struck out and not that the particulars be given; *Reason v. Knight*, 8 A.L.T., 15.

Particulars were ordered:—Of justification pleaded to an action for libel; *Hedrick v. Purse*, 6 A.L.T., 222; *Brown v. The Brisbane Newspaper Co.* (1902), S.R. (Q.), 69; of the persons in whose presence an alleged slander was uttered, after plea pleaded and issue joined; *Ford v. Holder*, 17 W.N. (N.S.W.), 67; of particulars of all the facts which the defendant proposed to prove on the following defence to an action for libel; "in so far as the words set out in the statement of claim consist of allegations of fact, they are true in substance and in fact; in so far as they consist of expressions of opinion, they are fair comment made in good faith and without malice upon the said facts which are matters of public interest"; *Trengrove v. Callender*, 26 V.L.R., 249; of service referred to in a defence which stated that "the plaintiff was served with the bill of complaint in the said

equity suit, and well knew of the proceeding therein, but did not enter an appearance"; *Bennett v. Morris*, 8 A.L.T., 2; where in an action for infringement of a patent, the defendant pleaded want of novelty and accompanied the defence by particulars of objections, alleging prior publication of the inventions in certain gazettes and books, but without stating the precise pages, passages or chapters relied on; *The Victorian C.T. Co. Ltd. v. Melbourne Tramways Trust*, 14 V.L.R., 250; of the time when, the place where a defendant alleged that he became bankrupt; *Horn v. Sachs*, 19 A.L.T., 113; where the plaintiff had not given a detailed statement of particulars in an action for breach of covenant for non-repair; *Lazar v. Williamson*, 1 W.N. (N.S.W.), 33; in an action for fraudulent representation where the claim omitted a material fact; *Desailly v. Ham*, 6 A.L.T., 21.

Where the defendant is ordered to give particulars under a defence of payment, he cannot refuse or neglect to give such particulars on the ground that the particulars asked for are contained in books in the possession of the opposite party, to which he has no access. The proper course to be adopted is to apply for discovery and thus enable him to obey the order; *Wazman v. Groth*, 10 A.L.T., 13. The rule with regard to particulars has always been presumed to be that a party should not be compelled to disclose his evidence. In cases of necessity, however, this rule will be departed from, but to as slight an extent as possible; *M'Carron, Bird & Co. v. Syme*, 15 V.L.R., 282.

ORDER FOR PARTICULARS REFUSED. — Where in an action for malicious prosecution the defendant merely denies the facts alleged, or states that he had reasonable and probable cause, then, in the absence of special facts stated upon affidavit or appearing upon the pleadings, particulars of the reasonable and probable cause should not be ordered; *Ryan v. Woodbridge*, 16 V.L.R., 572.

In an action on a judgment obtained in Her Majesty's High Court of Justice in England, it was held that the defendant was not bound to deliver particulars of the circumstances or grounds by reason of which he alleged in his pleading that he was not at any time in the course of the action subject to the jurisdiction of the High Court of Justice in England; *Corsair C. G. M. Co. Ltd. v. Gray* (No. 1), 20 A.L.T., 173. A plaintiff suing as executor of a deceased person will not be ordered to furnish particulars, before discovery, of a verbal agreement set up in the reply, and alleged to have been made between the deceased and the defendant, the inability of the plaintiff to give such particulars at the then stage of the action being a special circumstance warranting the Court in refusing to make an order; *Buckley v. McKenzie*, 4 A.L.R., 229.

An application was refused where the defendant in an action for seducing the plaintiff's daughter applied for further particulars and did not deny the seduction; *Currens v. Quinn*, 19 W.N. (N.S.W.), 277; where in an action for libel consisting of a notice of dishonour of plaintiff's cheque being sent to the holder thereof by the defendant and after the close of pleadings an application was made on behalf of the defendant for particulars of the names of the persons to whom the libel was alleged by plaintiff to have been published by defendant; *Lery v. Union Bank*, 17 A.L.T., 112; where the defendant from his position knew the particulars in an action; *Tait v. Woods*, 1 W.N. (N.S.W.), 61.

See also *Chitty's Archbold*, 14th ed., 380.

Effect of order
for particulars.
Cf., E. Or. 19,
r. 8.

2. The party at whose instance particulars have been delivered under a Justice's order shall, unless the order otherwise provides, have the same length of time for taking any step in the action after the delivery of the particulars that he had at the return of the summons. Save as in this Rule provided, an order for particulars shall not, unless the order otherwise provides, operate to stay proceedings, or to give any extension of time.

As to the power of the Court to enlarge the time for taking any proceedings, see Or. 45, r. 6.

Actions for
damage by
collision.
Preliminary acts
to be filed.
Cf., E. Or. 19,
r. 28.

3. In actions for damage by collision between vessels, unless the Court or a Justice otherwise orders, the plaintiff shall within seven days after the commencement of the action, and the defendant shall within seven days after appearance, and before any pleading is delivered, file in the Registry a document to be called a preliminary act, which shall be sealed up, and shall not be opened until ordered by the Court or a Justice, and which shall contain a statement of the following particulars :—

- (a) The names of the vessels which came into collision, and the names of their masters ;
- (b) The time of the collision ;
- (c) The place of the collision ;
- (d) The direction and force of the wind ;
- (e) The state of the weather ;
- (f) The state and force of the tide ;
- (g) The course and speed of the vessel when the other was first seen ;
- (h) The lights, if any, carried by her ;
- (i) The distance and bearing of the other vessel when first seen ;
- (k) The lights, if any, of the other vessel which were first seen ;
- (l) Whether any lights of the other vessel, other than those first seen, came into view before the collision ;
- (m) What measures were taken, and when, to avoid the collision ;
- (n) The parts of each vessel which first came into contact ;
- (o) What sound signals, if any, were given, and when ;
- (p) What sound signals, if any, were heard from the other vessel, and when.

The Court or a Justice may, on the application of either party, order the preliminary acts to be opened at any time and the evidence to be taken thereon without its being necessary to deliver any

pleadings; but in that case, if either party intends to rely on the defence of compulsory pilotage, he may do so, upon giving notice thereof in writing to the other party, within two days from the opening of the preliminary acts or within such further time as the Court or a Justice allows.

The fee payable on filing a preliminary act is 5s. ; Rule of Court, October 6th, 1903.

An amendment of a preliminary Act should be rarely if ever allowed ; *Jacobus v. The Vanguard*, 2 Q.L.J., 28.

4. The preliminary acts may be opened as soon as the action Opening acts.
has been set down for trial. A.R., 1894, r. 26.

As to entry of action for trial, see Or. 30, rr. 10, *et seq.*

ORDER XVI.

STATEMENT OF CLAIM.

1. When a statement of claim is delivered, the plaintiff may Claim beyond indorsement.
therein alter, modify, or extend his claim against any defendant who Ct., E. Or. 20, r. 4.
has appeared, without any amendment of the indorsement of the writ.

As to trial without pleadings, see Or. 13, r. 1 ; as to pleading generally, see Or. 14 ; as to amendment of writ, see Or. 24, rr. 1, 2 ; of statement of claim, *ib.*, r. 3.

2. The statement of claim must state the proposed place of Claim must show proposed place of trial.
trial.

As to determination of place of trial, see Or. 30, r. 1 ; as to change of venue, see H.C.P. Act, sec. 25 ; as to venue in revenue cases, *Jud. Act*, sec. 82 ; as to transfer of causes from one registry to another, see H.C.P. Act, sec. 6, *et seq.* R. 5 of E.O. corresponding to this rule was repealed July 1902.

3. Every statement of claim shall state specifically the relief Relief claimed to be specifically stated.
which the plaintiff claims, whether singly or in the alternative, and it E. Or. 20, r. 6.
shall not be necessary to ask for general or other relief, which may always be given, as the Court or a Justice thinks just, to the same extent as if it had been asked for. And the same rule shall apply to any cross-claim made by the defendant in his defence.

As to general rules of pleading, see Or. 14 ; as to cross-action, see Or. 17, rr. 9, 10.

A defendant's counter-claim was for specific performance or damages. Before the trial specific performance was given. As the defendant shaped his counter-claim he was not entitled to both. The defendant having obtained what he asked for was not, without amendment, in a position to proceed for damages ; *Munro & Baillieu v. Adams*, 17 V.L.R., 703.

Statement of
claim.

Cl. E. Or. 20,
r. 1.

4. The delivery of statements of claim shall be regulated as follows :—

- (a) Subject to the provisions of Order X., Rule 9, as to filing a statement of claim when the defendant does not appear, a statement of claim need not be delivered unless the defendant at the time of entering his appearance, or within ten days thereafter, gives notice in writing to the plaintiff or his solicitor that he requires a statement of claim to be delivered :
- (b) If a statement of claim has not been delivered, and the defendant gives notice requiring the delivery of a statement of claim, the plaintiff shall, unless otherwise ordered by the Court or a Justice, deliver it within six weeks from the time of his receiving such notice :
- (c) The plaintiff may deliver a statement of claim, either with the writ of summons or notice in lieu of writ of summons, or at any time afterwards, either before or after appearance, notwithstanding that the defendant has appeared and has not required the delivery of a statement of claim : Provided that, when a defendant has appeared and has not required the delivery of a statement of claim, a statement of claim shall not, without the leave of the Court or a Justice, be delivered later than three months after the appearance has been entered :
- (d) When the plaintiff delivers a statement of claim without being required to do so, or the defendant unnecessarily requires a statement of claim to be delivered, the Court or a Justice, if it appears that the delivery of a statement of claim was unnecessary or improper, may make such order as to the costs occasioned thereby as is just.

When defendant fails to enter appearance, plaintiff on filing statement of claim may proceed ; Or. 10, r. 10.

As to manner in which pleadings are to be delivered, see Or. 14, r. 7 ; as to dismissal of action for want of prosecution when plaintiff makes default in delivery of statement of claim, see Or. 23, r. 1.

No delivery or amendment of statement of claim is allowed in vacation : Or. 45, r. 3 ; vacation is not reckoned in time for delivery of pleading ; *ib.*, r. 4 ; as to time of day for service of pleading, see *ib.*, r. 7.

ORDER XVII.

DEFENCE.

1. In actions for a debt or liquidated demand in money, a mere denial of the debt is not sufficient. Mere denial insufficient.
Cf., E. Or. 21, r. 1.

As to pleading generally, see Or. 14 ; as to insufficiency of a general denial, *ib.*, r. 10 ; as to general denial of allegations, *ib.*, r. 15 ; as to effect of a general denial, *ib.*, r. 18 ; and of a denial of contract, *ib.*, r. 19 ; as to payment into Court, see Or. 18, r. 1 ; as to defence of tender, *ib.*, r. 2 ; as to defence arising after action brought, see Or. 20 ; as to defence of person of unsound mind, see *In re Newman-Wilson*, 6 Q.L.J., 215.

2. In actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact ; for example, the drawing, making, indorsing, accepting, presenting, or notice of dishonour, of the bill or note or cheque. Defence to action on bills, &c.
E. Or. 21, r. 2.

3. In actions to recover a debt or liquidated demand under a contract, a defence in denial must deny any matters of fact from which the liability of the defendant is alleged to arise which are disputed ; for example, in actions for goods bargained and sold or for goods sold and delivered, the defence must deny the order or contract, the delivery, or the amount claimed ; in an action for money received to the use of the plaintiff, it must deny the receipt of the money, or the existence of those facts which are alleged to make such receipt by the defendant a receipt to the use of the plaintiff. Defences to action for debt or liquidated demand.
Cf., E. Or. 21, r. 3.

As to effect of a bare denial of a contract, see Or. 14, r. 19.

4. A denial or defence shall not be necessary as to damages claimed or their amount ; but the damages shall be deemed to be put in issue in all cases, unless expressly admitted. Pleading to damages.
E. Or. 21, r. 4.

As to how far a plea in mitigation of damages is allowable, see *Heffernan v. Hayes*, 25 V.L.R., 156. A plea as to damages was struck out ; *The Australian Gold Recovery Co. Ltd. v. Williams*, 25 V.L.R., 293.

5. If any party desires to put in issue the right of any other party to claim as executor or administrator, or as trustee, whether in bankruptcy or insolvency or otherwise, or in any representative or other alleged capacity, or to put in issue the alleged constitution of any partnership firm, he must do so specifically. Denial of right of person in representative capacity.
E. Or. 21, r. 5.

As to actions by or against persons in representative capacity, see Or. 2, rr. 8, 12, *et seq.*

6. When a statement of claim is delivered to a defendant, he must deliver his defence within eight days from the time of the Time for delivery of defence.

*Ct., E. Or. 21,
r. 6.*

*Ct., Q. Or. 25,
r. 6.*

delivery of the statement of claim, or from the time limited for appearance, whichever is the later time, unless such period is extended by the Court or a Justice.

As to time limited for appearance, Or. 4, r. 10; as to manner of delivery of pleadings, see Or. 14, r. 7; as to judgment in default of pleading, see Or. 23, r. 2, *et seq.*; as to computation of time limited by rule, see Or. 45; no delivery or amendment of statement of claim is allowed in vacation, Or. 45, r. 3; vacation is not to be reckoned in time for delivery of pleading, *ib.*, r. 4; as to time of day for service of pleading, see *ib.*, r. 7; as to extension of time, see *ib.*, r. 6.

A defendant who has delivered no defence cannot appear at the trial; *De Pury v. Briggs*, 15 A.L.T., 272.

Time for delivery
of voluntary
defence.

*Ct., E. Or. 21,
r. 8.*

*Ct., Q. Or. 25,
r. 7.*

7. A defendant who has appeared in an action, and who has neither received nor required the delivery of a statement of claim, must deliver his defence, if any, within sixteen days after his appearance, unless the time is extended by the Court or a Justice.

See note, r. 6, *supra*.

Admissions.

E. Or. 21, r. 9.

8. When a Court or a Justice is of opinion that any allegation of fact denied or not admitted by the defence ought to have been admitted, the Court or Justice may make such order as is just with respect to any extra costs occasioned by the denial or failure to admit.

Cross-action.

*Ct., E. Or. 21,
r. 10.*

9. When a defendant relies upon any facts or circumstances alleged in the pleadings as establishing a right of cross-action, he must, in his defence, state specifically that he relies on them by way of cross-action.

As to right of cross-action, see *Jud. Act*, sec. 32, Or. 14, r. 3; as to judgment in default of pleading, see Or. 23.

The defence and cross-action are distinct pleadings and should be kept separate; *Ballarat Banking Co. Ltd. v. Wall*, 6 A.L.T., 157. A defence by way of set-off is not a defence by way of counter-claim unless it is so pleaded specifically: *Reynolds v. Taylor*, 8 A.L.T., 13.

Answer by way
of cross action.

*Ct., Q. Or. 25,
r. 15.*

10. The plaintiff may set up, in reply to a defence by way of cross-action, any matter arising out of the facts alleged in the defence which would be available to him as a defence if the defence were a statement of claim in an action against him, notwithstanding that the reply may in itself be in the nature of a cross-action.

Judgment for
balance.

*Ct., E. Or. 21,
r. 17.*

11. When, in any action for a pecuniary demand, a set-off or cross-claim for a pecuniary demand is established as a defence against the plaintiff's claim, the Court or a Justice may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he is entitled to upon the merits of the case.

Where a jury find a verdict for the plaintiff on his statement of claim, but find a verdict for the defendant for a larger amount on his counter-claim, judgment should be entered for the defendant for the difference between the two amounts; *Tubbs v. The Equitable Co-operative Co. Ltd.*, 7 A.L.T., 46. As to the inherent jurisdiction of the Court to at any time set-off one judgment against another and to direct judgment to be entered for the balance, see *Bank of N.S.W. v. Preston*, 20 V.L.R., 1. The plaintiff recovered judgment for the return of certain articles, damages and costs; the defendant, on the counterclaim, for a debt owing by the deceased. On an application that the judgment by the defendant might be set off *pro tanto* against the judgment for costs obtained by the plaintiff upon the claim, it was held that the judgments could not be set off; *King v. A. J. S. Bank*, 4 Q.L.J., 71.

12. No defence shall be pleaded in abatement.

Plea in
abatement.

As to application to strike out or substitute a party, see Or. 2, r. 10.

E. Or. 21, r. 20.

Where an action is brought against one only of two or more joint contractors the defendant cannot plead the non-joinder of his co-contractors as a defence, such pleading being in reality a plea in abatement; *Mais v. Reid*, 25 V.L.R., 70.

ORDER XVIII.

PAYMENT INTO COURT.

1. In an action to recover a debt or damages, the defendant may, before or at the time of delivering his defence, or at any later time by leave of the Court or a Justice, pay into Court a sum of money by way of satisfaction, which shall, unless otherwise stated, be taken to admit the cause of action in respect of which the payment is made :

Defendant may
pay money into
Court with or
without
admitting
liability.
Ct., E. Or. 22,
r. 1.

Or he may pay money into Court in respect of any cause of action, with a defence denying liability in respect thereof; in which case the money so paid into Court shall be subject to the provisions of Rule 6 of this Order.

As to payment into Court being stated in defence, see r. 3, *infra*; as to notice of payment being served on plaintiff, see r. 4, *infra*; as to payment into Court in actions in respect of disputed contracts, see Or. 37, r. 4.

PAYMENT AND NO DENIAL OF LIABILITY.—Where a defendant admitted a trespass and paid a sum of money into Court without any reservation a magistrate was held wrong in non-suiting; *Hop Lee v. Mill*, 3 W.A.L.R., 163.

PAYMENT AND DENIAL.—In an action of slander, where the inuendo alleged by the plaintiff places the meaning upon the words complained of beyond the natural meaning of such words, the defendant, in his defence, may deny the inuendo and admit the slander, and pay money into Court in respect of such slander; *Caldwell v. Donaldson*, 18 V.L.R., 3.

A defendant will not be allowed to deliver interrogatories before defence for the purpose of ascertaining the amount of damages to pay into Court where there is a denial of liability; *Kraitzer v. Jenkins*, 17 V.L.R., 42.

Defence of tender.

Cf., E. Or. 22, r. 3.

2. When a defence sets up a tender before action, the sum of money alleged to have been tendered must be paid into Court before the delivery of the defence.

Defence to state payment.

3. Payment into Court shall be signified in the defence, and the claim or cause of action, if any, in satisfaction of which the payment is made shall be specified therein.

Receipt to accompany.

Cf., E. Or. 22, r. 2.

A duplicate receipt for the money paid into Court shall be delivered with the defence.

Notice of payment.

4. If the defendant pays money into Court before delivering his defence, he must serve upon the plaintiff a notice specifying both the fact that he has paid in the money and also the cause of action in respect of which the payment has been made.

Receipt.

Cf., E. Or. 22, r. 4.

A duplicate receipt for the money paid into Court shall be delivered with the notice.

Plaintiff may accept in satisfaction.

Cf., E. Or. 22, r. 7.

5. When payment into Court is made before delivery of a defence the plaintiff may, within eight days after notice of the payment, and when the payment is first signified in a defence the plaintiff may at any time before joining issue, accept in satisfaction of the cause of action in respect of which the payment has been made the sum so paid in, in which case he shall give notice of such acceptance to the defendant, and shall be at liberty, in case the whole action is thereby satisfied, to tax his costs, if he is entitled to any, after the expiration of four days from the service of such notice, unless the Court or a Justice otherwise orders, and in case of non-payment of the costs within four days after taxation he may sign judgment for his costs so taxed.

As to time for joining issue, see Or. 19, r. 3; as to computation of times limited by this rule, see Or. 45. See as to the corresponding Victorian rule, *Colonial Bank v. Gillespie*, 7 A.L.T., 95; *Turnbull & Co. v. Dean & Co.*, 9 A.L.T., 198.

When defence denies liability.

Cf., E. Or. 22, r. 6.

6. When the liability of the defendant in respect of the cause of action in satisfaction of which the payment into Court has been made is denied in the defence, the following Rules shall apply:—

- (a) The plaintiff may accept, in satisfaction of the cause of action in respect of which the payment into Court has been made, the sum so paid in, in which case all further proceedings in respect of that cause of action, except as to costs, shall be stayed; or he may join issue, in which case the money shall remain in Court subject to the provisions hereinafter contained;

- (b) If the plaintiff accepts the money so paid in, he shall give notice of such acceptance to the defendant ;
- (c) If the plaintiff does not accept, in satisfaction of the cause of action in respect of which the payment into Court has been made, the sum paid in, but proceeds with the action in respect of that cause of action, or any part thereof, the money shall remain in Court, and shall, on the determination of the action, be subject to the order of the Court or a Justice, and shall not be paid out of Court except in pursuance of such an order. If the plaintiff proceeds with the action in respect of that cause of action, or any part thereof, and recovers less than the amount paid into Court, the amount paid in shall be ordered to be applied, as far as is necessary, in satisfaction of the plaintiff's claim ; and the balance shall, unless otherwise ordered, be repaid to the defendant. If the defendant succeeds in respect of that cause of action, the whole amount shall be ordered to be repaid to him.

As to payment out of Court of money paid in as security for costs, see Or. 25, r. 15 ; on summons, Or. 40, r. 3 ; as to time for delivery of joinder of issue, see Or. 19, r. 3.

For a case in which the acceptance by the plaintiff in his reply of a sum paid into Court in respect of a claim for rent was held not to amount to a waiver of a breach of covenant which took place after the rent became due, see *Toogood v. Mills*, 23 V.L.R., 106.

Where the defendant paid 40s. into Court with a denial of liability and the 40s. was ordered to be paid to the plaintiff and nothing more, the Court gave judgment for the defendant with costs ; *Allen v. Melville*, 12 A.L.T., 5.

7. When money is paid into Court in two or more actions which are consolidated, the money paid in and the costs in all the actions shall, unless otherwise directed by the order of consolidation, be dealt with in the same manner as in the test action.

Consolidated actions.
Cf., E. Or. 22, r. 8.

As to consolidation of actions, see Or. 39.

ORDER XIX.

REPLY AND SUBSEQUENT PLEADINGS.

1. A plaintiff shall deliver his reply, if any, within eight days after the defence or the last of the defences has been delivered, unless the time is extended by the Court or a Justice.

Time for reply.
A.R. 1894 r. 29.
Cf. E. Or. r. 23, r. 2.

The provisions of this order are subject to any order made on a summons for directions ; Or. 12 ; as to the time for delivery of defence, see Or. 17, rr. 6, 7 ; as to the computation of the time limited by this rule, see Or. 45.

In Victoria it was held that the reply to a counterclaim must be delivered within eight days ; *Bromell v. Robertson*, 11 V.L.R., 534.

Pleadings by
leave after reply.
E. Or. 23, r. 3.

2. No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a Justice, and then shall be pleaded only upon such terms as the Court or Justice thinks fit.

As to the time of delivery of such pleading, see r. 3, *infra*. It is not necessary for a party applying under this rule to deliver a copy of the proposed pleading on the opposite party ; *Laffy v. Dougharty*, 6 A.L.T., 251. Under the Victorian Rules a defendant may not, after the pleadings in an action have closed, deliver a further defence by way of counterclaim, without leave of the Court, even although the new matter was pleaded by the defendant within eight days of its discovery by him ; *Dale v. Nelson*, 24 V.L.R., 937.

Pleadings
subsequent to
reply.
Cf. E. Or. 23,
r. 3.

3. Subject to the last preceding Rule, every pleading subsequent to reply shall be delivered within four days after the delivery of the previous pleading, unless the time is extended by the Court or a Justice.

As to computation of time under this rule, see Or. 45. No delivery or amendment of pleadings is allowed in vacation ; Or. 45, r. 3 ; vacation is not to be reckoned in time for delivery of pleadings ; *ib.*, r. 4 ; the time limited for giving security for costs, also, is not to be reckoned ; *ib.*, r. 5 ; as to enlarging or abridging time ; *ib.*, r. 6.

Effect of joinder
of issue.
Cf. E. Or. 10,
r. 15.
Cf., Q. Or. 27,
r. 7.

4. As soon as any party has joined issue upon the preceding pleading of the opposite party simply, without adding any further or other pleading thereto, the pleadings as between those parties shall be deemed to be closed.

As to joinder of issue, see Or. 14, r. 17 ; as to close of pleadings on default, see Or. 23, r. 9.

This rule only applies where the pleading is simply confined to a joinder of issue. An objection of law, coupled with a joinder of issue, takes the pleading out of the operation of the corresponding Victorian rule ; *Barnett v. Rose*, 8 A.L.T., 9. See also *Bancroft v. Mayor of South Melbourne*, *ib.*, 89. When a plaintiff is suing several defendants, appearing separately, and has *bond fide* allowed one defendant extension of time for delivering pleadings, but has proceeded with regard to another defendant to a reply to which no further pleadings have been delivered, such other defendant cannot insist upon the plaintiff setting down the case for trial, or filing the memorandum under the Victorian Rules of close of pleadings against him. A defendant's remedy in case of undue and unfair delay in the proceedings is to apply to the Court under its general jurisdiction for an order directing the plaintiff "to speed the cause" ; *McFarlane v. O'Farrell*, 21 V.L.R., 156.

New assignment.
Cf., Q. Or. 27,
r. 8.

5. A new assignment shall not be necessary or used. But everything which would otherwise need to be alleged by way of new assignment shall be introduced by amendment of the statement of claim.

As to amendment of pleadings generally, see Or. 24.

A reply was ordered to be struck out on the ground *inter alia* that it raised a "new assignment" in *McKenzie v. Hunham*, 6 A.L.T., 153.

ORDER XX.

MATTERS ARISING PENDING THE ACTION.

1. Any ground of defence which has arisen after action brought, but before the defendant has delivered his defence, and before the time limited for his doing so has expired, may be set up by the defendant in his defence, either alone or together with other grounds of defence. And if, after a defence has been delivered, any ground of reply arises to any set-off or cross-claim alleged therein by the defendant, it may be set up by the plaintiff in his reply, either alone or together with any other ground of reply.

Before defence.
Ct., E. Or. 24,
r. 1.

As to the time limited for delivery of defence, see Or. 17, rr. 6, 7.

Matters arising after the commencement of an action, and after reply, and which are admissible in evidence against the defendant as showing an answer to the defence, may be raised in the reply by amendment; *The Real Estate Mortgage and Deposit Bank v. Cromie*, 20 V.L.R., 337.

Semble, that in an action for dissolution of a syndicate on the ground of the disagreement of the members *inter se* particulars may be given under the statement of claim of the conduct of such members after the issue of the writ, showing their inability to agree; *Cayron v. Russell*, 3 A.L.R., 137.

2. When any ground of defence arises after the defendant has delivered a defence, or after the time limited for his doing so has expired, the defendant may, and when any ground of reply to any set-off or cross-claim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may, within eight days after such ground of defence or reply has arisen, or, by leave of the Court or a Justice, at any subsequent time, deliver a further defence or reply as the case may be, setting forth such ground of defence or reply.

Further
defence or
answer.
Ct., E. Or. 24,
r. 2.

As to computation of time limited by this rule, see Or. 45.

An application to deliver a further defence which has arisen after the delivery of the defence, should be by summons, and should be supported by an affidavit stating that the matter is true, and when it arose; *Sander v. Sundercombe*, 15 V.L.R., 580. See also, *Dale v. Nelson*, 24 V.L.R., 937.

3. When any defendant, in his defence, or in any further defence delivered as in the last preceding Rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of that defence, and may thereupon sign judgment for his costs up to the time of the pleading of that defence, with costs of judgment, unless the Court or a Justice, either before or after the delivery of such confession, otherwise orders.

Confession of
defence.
Ct., E. Or. 24,
r. 3.

ORDER XXI.

DEMURRER.

Demurrer.
Ct., E. Or. 25.

1. Any party may demur to any pleading of the opposite party, or to any part of a pleading which sets up a distinct cause of action, or to any distinct and severable claims for damages, or to any claim for damages exceeding an amount named by the demurring party, or to any pleading or part of a pleading of the opposite party which sets up a distinct ground of defence, set-off, cross-claim, or reply, as the case may be, on the ground that the facts alleged do not show any cause of action, claim for damages, or ground of defence, set-off, cross-claim, or reply, as the case may be, to which effect can be given by the Court as against the party demurring.

The provisions of this order are subject to such variations or modifications as the Court or a Justice may think fit to make on a summons for directions under Or. 12. The English and Victorian Orders abolish demurrers and provide for proceedings in lieu of demurrer. No technical objection can be made to a pleading on the ground of any alleged want of form; see Or. 14, r. 28. See also, H.C.P. Act, sec. 24.

Objections to statements in a pleading on the ground that they amount to statement of evidence should be taken on summons to strike out and not on demurrer; *Miles v. M'Ilwraith*, 1 Q.L.J., 33.

A demurrer will not lie against the relief claimed in the prayer of a claim: *Plant v. Attorney-General*, 5 Q.L.J., 57.

A claim for a declaration of right without a claim for consequential relief is not demurrable when the Court has power to give consequential relief either in the same or other proceedings; *Leahy v. Lemel*, 8 Q.L.J., 19.

Where a demurrer going to whole of a statement of claim has been allowed, the action is to be deemed to be gone, and no further applications can be made in the action, unless on evidence that an appeal is pending from the allowance of the demurrer; *Williams v. Morgan*, Queensland Dig., col. 205.

Demurrer to
state whether
the whole or
part. Ground.
Frivolous.
Demurrer set
aside with costs.
Q. Or. 20, r. 2.

2. A demurrer must state specifically whether it is to the whole or to a part, and if so to what part, of the claim or pleading of the opposite party. It must state some ground in law for the demurrer, but the party demurring shall not on the argument of the demurrer be limited to the ground so stated. If no ground or only a frivolous ground of demurrer is stated, the Court or a Justice may set the demurrer aside with costs.

Delivery.
Q. Or. 20, r. 3.

3. A demurrer shall be delivered in the same manner and within the same time as any other pleading.

As to the time and manner in which pleadings are to be delivered, see Or. 14, r. 7, and Or. 45, rr. 4, 7.

4. When a party entitled to deliver a pleading desires both to demur and plead to the last pleading of the opposite party, or to demur to part of the last pleading of the opposite party and to plead to other part thereof, he shall combine the demurrer and other pleading.

Demurrer and defence in one pleading.

Q. Or. 29, r. 4.

As to right of party to plead and demur together without leave, see r. 5, *infra*.

5. Any party may plead and demur to the same matter without leave. When a party demurring pleads as well as demurs, it shall be in the discretion of the Court or a Justice to direct whether the issues of law or fact shall be first disposed of.

Leave to plead and demur together not necessary.

Q. Or. 29, r. 5.

6. When the claim or defence of any party depends, or may depend, upon the construction of a written document, and the party in his pleading refers to the document but does not set it out at length, the opposite party may, in his demurrer, set out the document at length or so much thereof as is material, and demur to the claim or defence founded upon it, in the same manner as if it had been pleaded at length by the other party.

Demurrer to claim founded on document.

Q. Or. 29, r. 6.

If he does not set out the document truly or sufficiently the Court or a Justice may order the demurrer to be struck out or amended.

As to pleading the effect of documents in the first instance without setting out the documents at length, see Or. 14, r. 20.

7. When a demurrer, either to the whole or part of a pleading, is delivered, either party may set down the demurrer for argument before the Court immediately, and the party setting down the demurrer shall on the same day give notice thereof to the other party. If the demurrer is not set down and notice given within ten days after delivery, and if the party whose pleading or claim is demurred to does not within that time amend, the demurrer shall be held sufficient for the same purposes and with the same result as to costs as if it had been allowed on argument, and the same judgment may be entered thereon.

Demurrer not entered for argument to be held sufficient.

Q. Or. 29, r. 7.

As to effect of decision on demurrer, see rr. 10, 11, *infra*; as to indorsement on demurrer of notice requiring demurrer to be set down for argument, see Or. 14, r. 32; as to computation of time limited by this rule, see Or. 45.

The fee payable on entering a demurrer for argument is £1; Rule of Court, October 6th, 1903.

8. While a demurrer to the whole or any part of a pleading is pending, that pleading shall not be amended except on payment of the costs of the demurrer, unless by leave of the Court or a Justice.

Amendment pending demurrer.

Q. Or. 29, r. 8.

As to amendment generally, see H.C.P. Act, secs. 23, 24, and Or. 24.

Leave to amend was given notwithstanding that a demurrer was pending, the costs of the demurrer being reserved for the Full Court; *Walters v. Eldridge*, 4 Q.L.J., 79.

Costs when
demurrer
allowed.

Q. Or. 29, r. 9.

9. When a demurrer to the whole or part of any pleading or claim is allowed upon argument, the party whose pleading or claim is demurred to shall pay to the demurring party the costs of the demurrer, and when a demurrer is overruled the demurring party shall pay to the opposite party the costs occasioned by the demurrer, unless in either case the Court otherwise orders.

As to costs generally, see Or. 46; *Jud. Act*, secs. 26, 27.

Effect of decision
on demurrer
going to whole
action.

Q. Or. 29, r. 10.

10. Subject to the power of amendment, when a demurrer to the whole of any pleading, so far as it relates to a separate cause of action, is allowed or overruled, the Court shall give such judgment as to that cause of action as upon the pleadings the successful party appears to be entitled to, and, if the judgment is for the defendant with respect to the whole action, the plaintiff shall pay to the defendant the costs of the action, unless the Court otherwise orders.

As to the power of the Court or a Justice to amend generally, see H.C.P. Act, secs. 23, 24, Or. 24; as to costs generally, see Or. 46; *Jud. Act*, secs. 26, 27.

Where a purely technical point is taken the Court will allow an amendment to be made; *Jacobus v. Smith*, 8 N.S.W.L.R., 21.

Where
demurrer
allowed to part
of a pleading
that part is to
be deemed to be
struck out.

Q. Or. 29, r. 11.

11. When a demurrer to any pleading or claim or part of a pleading or claim is allowed in any case not falling within the last preceding Rule, then, subject to the power of amendment, the matter demurred to shall as between the parties to the demurrer be deemed to be struck out of the pleadings, and the rights of the parties shall be the same as if it had not been pleaded.

Demurrer
overruled with
leave to plead.

Q. Or. 29, r. 12.

12. When a demurrer is overruled, the Court may make such order, and upon such terms as the Court thinks fit, for allowing the demurring party to raise by further pleading any case which he desires to set up in opposition to the matter demurred to.

Form of entry
for argument.

Q. Or. 29, r. 13.

13. A demurrer shall be set down for argument by filing a copy of the pleadings so far as they relate to the matters of law raised by the demurrer, and delivering to the registrar a memorandum of entry for argument.

As to the right of either party to set demurrer down for argument immediately after service of same, see r. 7, *supra*; as to hearing of demurrer by a single Justice or Full Court, see r. 14, *infra*; as to indorsement on demurrer of notice requiring demurrer to be set down for argument, see Or. 14, r. 32.

When demurrer
required to be
heard before
Full Court.

Q. Or. 29, r. 14.

14. When the party entering a demurrer for argument enters it to be heard before a single Justice, and any other party desires it to be heard before a Full Court in the first instance, he may, within four

days after receiving notice that the demurrer has been so entered, deliver to the Registrar and to the opposite party a memorandum to that effect, and the demurrer shall thereupon be deemed to have been entered to be heard before a Full Court in the first instance.

If the action is pending in a District Registry, the pleadings shall be forthwith transmitted to the Principal Registry, unless a sitting of a Full Court is appointed to be held within sixty days at the place where the District Registry is situated. After the decision of the Full Court the pleadings shall be returned to the District Registry with a certificate of the judgment or order of the Full Court.

As to computation of time limited by this rule, see Or. 45.

On demurrer, two counsel will be heard; *Bond v. The Commonwealth of Australia*, 1 C.L.R., 13; *Miles v. McIlwraith*, 1 Q.L.J., 27.

15. Four days at least before the day for which a demurrer is set down for argument the party setting it down shall leave at the chambers of the Justice, or at the chambers of each of the Justices who are to sit on the hearing of the argument, a copy of the pleadings so far as they relate to the matters of law raised by the demurrer.

Pleadings for
Justices.
Q. Or. 20, r. 16.

As to computation of time limited by this rule, see Or. 45.

ORDER XXII.

DISCONTINUANCE, ETC.

1. The plaintiff may, at any time before receipt of the defence of any defendant, or after the receipt of the defence, but before taking any other proceeding in the action against that defendant other than an interlocutory application, by notice in writing wholly discontinue his action against that defendant, or withdraw any part of his alleged cause of action against that defendant, and thereupon he shall pay that defendant his costs of the action, or, if the action is not wholly discontinued, the taxed costs occasioned by the matter so withdrawn.

Discontinuance
of action before
defence.
Ct., E. Or. 26,
r. 1.

Such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action for the same cause.

The discontinuance not to prejudice any action consolidated therewith; see r. 4, *infra*; as to withdrawal of cause by consent, see r. 5, *infra*; as to entering judgment for costs on discontinuance, see r. 6, *infra*; as to staying subsequent action when costs of prior discontinued action not paid, see Or. 38, r. 5; as to security for costs where second action instituted for same cause, see Or. 25, r. 10.

The fee payable on filing a notice of discontinuance is 2s. 6d.; Rule of Court, Oct. 6th, 1903.

An appointment by a defendant to tax his costs of the plaintiff's discontinuance of an action is a step in the action, and as such amounts to a waiver and precludes the defendant from applying to set aside such discontinuance on the ground of irregularity; *Patterson v. Clarton*, 7 A.L.T., 45. The Victorian Order 26, r. 1, does not provide for discontinuance by one co-plaintiff independently of the others; *Henty v. Henty*, 25 V.L.R., 151.

Not otherwise
except by leave.
Cf., E. Or. 26,
r. 1.

2. Save as in this Order provided, a plaintiff may not withdraw the record or discontinue the action without leave of the Court or a Justice: But the Court or a Justice may, before, or at, or after, the hearing or trial, upon such terms as to costs, and as to bringing any other action, or otherwise, as are just, order the action to be discontinued, or any part of the alleged cause of action to be struck out.

In Victoria it has been held that a Judge has no power on an application by the plaintiff to order that an action be discontinued on the terms of the defendant's paying the costs of the action; *Mulcahey v. Wilkinson*, 9 A.L.T., 22.

A defendant cannot apply for an order for the discontinuance of an action under Order 26, r. 1 of Victorian Rules of 1884; *Rodgers & Sons v. Gerson*, 14 V.L.R., 298. See also, *Rodgers & Sons v. Heymannson*, 14 V.L.R., 300.

Court may allow
a defendant to
discontinue his
defence.
Cf., E. Or. 26,
r. 1.

3. The Court or a Justice may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his defence to be withdrawn or struck out: but a defendant may not withdraw his defence, or any part thereof, without such leave.

Effect on
consolidated
actions.
A.R., 1894, r. 28.
Cf., E. Or. 21,
r. 16.

4. The discontinuance of an action by the plaintiff shall not prejudice any action consolidated therewith.

As to consolidation of actions, see Or. 39.

Withdrawal by
consent.
E. Or. 26, r. 2.

5. When a cause has been entered for trial, it may be withdrawn by either the plaintiff or the defendant, upon production to the proper officer of a consent in writing, signed by the parties.

Entering
judgment on
discontinuance.
E. Or. 26, r. 3.

6. A defendant may enter judgment for the costs of the action if it is wholly discontinued against him, or for the costs occasioned by the matter withdrawn if the action is not wholly discontinued, if such respective costs are not paid within four days after taxation.

As to defendant's right to costs on discontinuance of action, see r. 1, *supra*: as to staying of subsequent action until such costs of prior action are paid, see Or. 38, r. 5; as to computation of time limited by this rule, see Or. 45.

ORDER XXIII.

DEFAULT OF PLEADING.

Default of
plaintiff in
delivering

1. If a plaintiff, being bound to deliver a statement of claim, does not deliver it within the time allowed for that purpose, the

defendant may, at the expiration of that time, apply to the Court or a Justice to dismiss the action with costs for want of prosecution; and on the hearing of the application the Court or Justice may order the action to be dismissed accordingly, or may make such other order, and on such terms, as is just.

As to the time limited for delivery of statement of claim, see Or. 16, r. 4; as to dismissal of action for non-compliance with order for discovery, see Or. 26, r. 19; or for failure to comply with order to produce books, see H.C.P. Act, s. 17; or upon failure to give notice of trial, see Or. 30, r. 7; or in default of appearance by plaintiff at trial; *ib.*, r. 17. As to fee payable on entering judgment, see Rule of Court, October 6th, 1903, *sub-tit.* "Drawing up and Entering Judgment."

An action cannot be dismissed for want of prosecution, for non-delivery of a statement of claim, if the statement of claim has been delivered before the hearing of the application, although subsequently to the issue of the summons for dismissal; Griffith, C.J., *Leathwaite v. Turner*, 9 Q.L.J. (N.C.), 76. Where a summons to dismiss was taken out after the statement of claim was delivered the defendant was ordered to pay the costs of the application; *Cutlish v. Reilly*, 9 A.L.T., 35. Where a summons to dismiss was taken out before the statement of claim was delivered, but the plaintiff, on the delivery of such statement of claim, made no offer to pay the costs of the summons incurred up to such delivery, the plaintiff was ordered to pay the costs of the application; *Hughes v. Bank of Victoria*, 9 A.L.T., 36. Where a solicitor institutes an action without authority he must, on the action being dismissed at the instance of the defendant, pay the costs of both parties; *Pearl v. Commercial Bank of Australia*, 10 A.L.T., 266. As to dismissal of action with costs unless certain terms complied with, see *Adcock v. Jolly*, 17 A.L.T., 107.

2. If the plaintiff's claim is for a debt or liquidated demand only, and any defendant fails to deliver a defence within the time allowed for that purpose, the plaintiff may, at the expiration of that time, enter final judgment against him for the amount claimed, together with interest at the rate claimed by the statement of claim as the rate agreed upon, if any, or, if no rate is claimed to have been agreed upon, at the rate of five per centum per annum to the date of the judgment, with his costs of action.

As to the effect of judgment by default against one of several defendants, see r. 12, *infra*; as to entry of judgment for debt or liquidated demand, where defendant fails to enter an appearance, see Or. 10, r. 3. Where a defendant who has been authorized to defend on behalf of, and for the benefit of, all persons interested, makes default in delivery of his defence, the plaintiff has a right to judgment; *Brown v. Fraser*, 22 V.L.R., 337.

3. If the plaintiff's claim is for detention of goods and pecuniary damages, or either, and all the defendants make default as mentioned in Rule 2 of this Order, the plaintiff may enter interlocutory judgment against the defendants, and a writ of inquiry may issue to assess the value of the goods and the damages, or either, as the case may be.

But the Court or a Justice may order that, instead of issuing a writ of inquiry, the value and the damages, or either, shall be ascertained in any other way which the Court or Justice directs.

As to judgment in such cases in default of appearance, see Or. 10, r. 5; as to writs of inquiry and references as to damages, see Or. 30, r. 25, *et seq.* This rule is not confined to cases where the claim is for detention of goods and pecuniary damages for their detention, but embraces all actions in which damages are claimed; *Lyon v. Hardenack*, 18 A.L.T., 82. In Victoria it was held that a defendant is entitled to be heard and to receive notice of the assessment of damages; *King v. Ring*, 24 V.L.R., 400. But where a writ for service out of the jurisdiction had been issued in an action for breach of promise, and was served upon the defendant, who did not appear, it was held that under the Victorian law it was not necessary to give the defendant notice of assessment; *Houston v. Knox*, 27 V.L.R., 105.

Where the plaintiff in an action claims specific performance of a contract, and, in the alternative, damages for breach of that contract, he is not at liberty, when the defendant has made default in pleading, to abandon his claim for specific performance and enter interlocutory judgment on the claim for damages. The plaintiff must set down the action on motion for judgment; *Barnet v. Haughton*, 16 V.L.R., 408.

Several
defendants.
(*Y.*, E. Or. 27,
r. 5.

4. When in any such action as in the last preceding Rule mentioned there are several defendants, of whom one or more make default as mentioned in Rule 2 of this Order, and the others do not make default, the plaintiff may enter interlocutory judgment against the defendants so making default. And in that case, the value of the goods and the damages, or either, as the case may be, may be assessed, as against the defendants suffering judgment by default, at the same time as the trial of the action or issues therein against the other defendants. But the Court or a justice may order that, instead of proceeding to the trial, the value and the damages, or either, shall be ascertained by a writ of inquiry, as directed by the last preceding Rule, or in any other way which the Court or Justice directs.

As to judgment in such cases in default of appearance, see Or. 10, r. 6; as to effect of judgment by default against one of several defendant, see r. 12, *infra*; as to writs of inquiry and references as to damages, see Or. 30, r. 25, *et seq.*

Liquidated
demand and
detention of
goods and
damages.
(*Cf.*, E. Or. 27,
r. 6.

5. If the plaintiff's claim is for detention of goods and pecuniary damages, or either, and also for a debt or liquidated demand, and any defendant makes default as mentioned in Rule 2 of this Order, the plaintiff may enter final judgment against him for the debt or liquidated demand, with interest and costs, and may also enter interlocutory judgment for the value of the goods and the damages, or either, as the case may be, and may proceed as provided in Rules 3 and 4 of this Order.

As to signing judgment in such cases in default of appearance, see Or. 10, r. 7.

6. If the plaintiff's claim is for a debt or liquidated demand, or the detention of goods and pecuniary damages, or for any of such matters, and the defendant delivers a defence which purports to offer an answer to part only of the plaintiff's alleged cause of action, then, if the unanswered part consists of a separate cause of action, or is severable from the rest, as in the case of part of a debt or liquidated demand, the plaintiff may, by leave of the Court or a Justice, enter judgment, final or interlocutory, as the case may be, for the part unanswered: Provided that, when there is a cross-claim, execution on the judgment in respect of the plaintiff's claim shall not issue without leave of the Court or a Justice.

Defence to part claim only.

E. Or. 27, r. 9.

7. In all other actions than those in the preceding Rules of this Order mentioned if the defendant makes default in delivering a defence, the plaintiff may set down the action as against him on motion for judgment, and such judgment shall be given as upon the statement of claim the plaintiff appears to be entitled to.

Default in other cases.

Cf., E. Or. 27, r. 11.

As to application for judgment in default of any subsequent pleadings, see r. 10, *infra*; as to motions for judgment, see Or. 33.

The fee payable on filing notice of motion is 10s., and on drawing up and entering judgment under this rule, 10s.; Rule of Court, October 6th, 1903.

On the motion for judgment the statement of claim alone can be looked at, and affidavits are not admissible on the question of costs which are in the discretion of the Court; the judgment of Higinbotham, J., in *Siegert v. Lawrence*, 11 V.L.R., 47, not followed; *Huxley v. Plunkett*, 2 A.L.R., 172. It is unnecessary that there should be an affidavit verifying the statement of claim in an action in which the defendant has not appeared; *Stewart v. Coughlan*, 11 V.L.R., 279. The filing of a statement of claim is imperative where the defendant does not appear; *Embling v. Parry*, 23 V.L.R., 70. See also, *Falkingham v. Harbison*, 24 V.L.R., 764; Or. 10, r. 9.

In Victoria where a writ was indorsed for an account and no appearance entered for the defendant, and an order had been made directing accounts and the Chief Clerk had given his certificate as to the amount found to be due, it was held that application should be made under a corresponding rule; *Riddell v. McWhinnie*, 16 V.L.R., 9. As to order made in a foreclosure action, see *National Bank v. Cohen*, 22 V.L.R., 269.

The fee payable on drawing up and entering judgment is 10s.; Rule of Court, October 6th, 1903.

8. When, in any such action as mentioned in the last preceding Rule, there are several defendants, then, if any defendant makes default in delivering a defence, the plaintiff may, if the cause of action is severable, set down the action at once on motion for judgment against that defendant, or may in any case set it down on motion for judgment against him at the time when it is entered for trial or set down on

One of several defendants in default.

Cf., E. Or. 27, r. 12.

motion for judgment against the other defendants. In the first case the Court may adjourn the motion to come on at the time last mentioned.

As to effect of judgment by default against one of several defendants, see r. 12, *infra*; as to motions for judgment, see Or. 33.

The fee payable on filing notice of motion is 10s., and on entering judgment 10s.; see Rule of Court, October 6th, 1903.

As to default where there are several defendants, see *Little v. Little*, 24 V.L.R., 203; *Crowley v. The Sandhurst and Northern District Trustee &c. Co.*, 23 V.L.R., 661.

Close of
pleadings on
default.

Cf., E. Or. 27,
r. 13.

9. If the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been admitted.

As to the times limited for the delivery of pleadings, see Or. 16, r. 4; Or. 17, rr. 6, 7; Or. 19, rr. 1, 3; Or. 24, r. 6; as to close of pleadings by joinder of issue, see Or. 19, r. 4; as to judgment on admission in pleadings, see Or. 27, r. 3.

Judgment by
default in other
cases.

Cf., E. Or. 27,
r. 14.

Cf., Q. Or. 31,
r. 14.

10. In any case not hereinbefore provided for, if any party makes default in delivering any pleading, the opposite party may apply to the Court or a Justice for such judgment (if any) as upon the pleadings he appears to be entitled to. And the Court or Justice may order judgment to be entered accordingly, or make such other order as is necessary to do complete justice between the parties.

As to judgment on admission in pleadings, see Or. 27, r. 3; as to motions for judgment, see Or. 33. The fee on filing notice of motion is 10s.; Rules of Court, October 6th, 1903.

Under the Queensland Rules it was held that, when a defendant had delivered a statement of defence and counter-claim, and no joinder of issue or answer had been served, the defendant could obtain judgment on the statement of claim and on the counter-claim; *Carr v. Jeffs*, 4 Q.L.J., 50.

Setting aside
judgment by
default.

Cf., E. Or. 27,
r. 15.

11. Any judgment by default under this Order may be set aside or varied by the Court or a Justice, upon such terms as to costs or otherwise as the Court or Justice thinks fit.

As to setting aside of judgment obtained by default, see Or. 10, r. 8; of judgment in default of appearance at trial, see Or. 30, r. 18; as to relief against judgments and orders, see Or. 34.

Effect of
judgment by
default.

Q. Or. 31, r. 16.

12. In any case in which a plaintiff enters judgment under the provisions of this Order against any defendant who makes default in delivering a defence, the entry of judgment shall not, nor shall the

issue of execution thereon, prejudice his right to proceed in the action against the other defendants.

As to signing judgment against one or more several defendants, see rr. 2, 4, 8, *supra*.

ORDER XXIV.

AMENDMENT.

1. The Court or a Justice may, in any cause or matter, at any stage of the proceedings, allow or direct either party to alter or amend the writ of summons, or any indorsement thereon or any pleadings or other proceedings, in such manner and on such terms as are just.

Amendment in general.
Ct., E. Or. 28, r. 1.

As to general power of amendment of defects and errors, see H.C.P. Act, secs. 23, 24; as to correction of clerical mistakes and accidental omissions, see r. 9, *infra*; as to amendment of indorsement on writ of summons, see Or. 4, r. 2; of pleading pending demurrer, see Or. 21, r. 8; of admissions, Or. 27, r. 2; of return to writ of *habeas corpus*, see Or. 42, r. 6; of irregular proceedings, Or. 49, r. 5; of notice of appeal from judgment of a Justice of the High Court, Part II., sec. 1, r. 3; as to power of amendment by Full Court on such appeal, *ib.*, r. 9; of amendment of notice of application for new trial, *ib.*, r. 20; of amendment of notice of appeal from judgment of Supreme Court of States, *ib.*, sec. IV., r. 3.

AT ANY STAGE.—Leave to amend pleadings will be granted at any stage of the proceedings where no injustice will be done thereby to the other side; *Bronnell v. Robertson*, 12 V.L.R., 560; *Spier v. Thorne*, 11 A.L.T., 110. An amendment should be made before judgment, for when an order has been made after hearing both sides the Court making the order cannot vary or alter it; *Roxburgh v. Tully*, 1 Q.L.J., 148; *Russell v. Taylor*, Queensland Dig., col. 211; *Queensland Investment and L. M. Co. Ltd. v. Grimley*, 4 Q.L.J., Supp., 3; *Woods v. Sheriff of Queensland*, 6 Q.L.J., 163; *Rex v. Municipal Council of Marony*, 29 V.L.R., 355. But compare *Hall v. Harris*, 25 V.L.R., 455. *Per* Madden, C.J.:—"But I may say we should have hesitated long before we came to the conclusion that a Judge under the circumstances in which our brother Hood found himself, having pronounced judgment, even although the order of the Court had been passed and entered, could not do what justice required by setting aside a judgment founded wholly upon the Judge's own error as to a fact and not upon any mistake in his deliberation." See also note to r. 9, *infra*. After an order is approved by both parties and signed by the Judge, objections to its form will not be entertained; *Cayron v. Russell*, 24 V.L.R., 69. An amendment of pleading was allowed after the close of the evidence to raise the question of deceit; *Hendler v. Bright Chrystal &c. Co.*, Queensland Dig., col. 204. An application to amend after the verdict of the jury was given was held to have been made too late; *Gibbs, Bright & Co. v. Roucan*, 13 V.L.R., 621.

Per Williams, J. (Vic.):—"This Court also upon the reservation (of questions reserved on the findings of a jury) has undoubtedly power to make any such amendment of the pleadings as it may think just and right upon such findings"; *Smart v. Lobb*, 16 V.L.R., at p. 500.

AMENDMENT OF PLEADINGS.—*Semble*, the amendments which the Judge is required to make under the *High Court Procedure Act*, sec. 23, are such as shall determine the real question which has been in controversy between the parties up to the trial, and which they had come to try. The Judge must exercise his discretion upon the materials before him, in determining whether an amendment asked for comes within this definition; *Dwyer v. O'Mullen*, 13 V.L.R., 933.

A party will be allowed to amend his pleadings, even although he has been guilty of unexplained delay in applying for leave to do so, unless the Court is satisfied that he is acting *mala fide*, or that by his delay he has done some other injury to the other party which cannot be compensated by costs; *Sweetnam v. Jacobs*, 17 V.L.R., 501. In an action against directors of a company for negligence and malfeasance in making advances on securities, an amendment that the advances were insufficient and worthless as being obtained in contravention of sec. 21 of the *Crown Lands Alienation Act* of 1876 was disallowed on appeal as being neither *bona fide* made, nor with reference to a matter which the parties originally came into Court to determine; *Queensland Investment Co. Ltd. v. Grimley*, 4 Q.L.J., 224. Upon an application for leave to amend, the Court has to consider whether there has been any such wilful or grossly negligent omission to bring forward the new matter sooner, as would deprive the applicant of the privilege of amending; *McLeod v. Henty*, 25 V.L.R., 648.

The hearing of an action was ordered to stand over to allow a plaintiff to amend his claim by putting in issue certain covenants, and to make the necessary demand for a reconveyance, and to put the result in issue; *Howell v. Harding*, 12 V.L.R., 538. In an action upon a guarantee for an overdraft, the defendant denied the execution of the guarantee, and pleaded that if it was executed, its execution was procured by fraud. At the close of the evidence the defendant applied for leave to amend by setting up that the guarantee was satisfied. Leave to amend was refused. *Held*, on appeal, that as on the plaintiff's own case the questions had arisen whether the deposit of certain scrip certificates, was for the benefit of the defendant, or the bank, and whether the guarantee was given on the understanding that it was to be given up as soon as the certificates were re-deposited with the bank, and as neither of these questions had been left to the jury, there must be a new trial with leave to amend; *Union Bank of Australia Ltd. v. Raim*, 6 Q.L.J., 58. Where, in an action for damages on the ground of misrepresentation, the plaintiff, after the pleadings were closed, discovered by means of interrogatories another ground of misrepresentation, he was allowed to amend his statement of claim at his own cost by adding such misrepresentation; *Hay v. Paterson*, 11 A.L.T., 20. Where one party has been allowed and has elected to amend his pleadings, the other party is perfectly at large, and may plead as broadly as he pleases; *Rees v. Duncan*, 25 V.L.R., 520.

"PROCEEDINGS."—An order *nisi* to review is a "proceeding," see *Tye v. Lunsell*, 25 V.L.R., 462. As to power to amend a conviction under a rule corresponding to sec. 24 of the *High Court Procedure Act*, see *R. v. Alley*, 6 A.L.T., 169.

TERMS.—Where an amendment is allowed on terms which are unreasonable, the Full Court has jurisdiction to review them. When the Judge at the trial imposes terms as a condition to allowing an amendment, and the parties applying accept those terms, they will not be allowed afterwards to contend that such terms

were unreasonable and extravagant; *Kilpatrick v. Huddart Parker & Co.*, 22 V.L.R., 369.

Where a plaintiff by his statement of claim discloses no right of action because he does not allege an interest, and the objection is taken by the defence, the Court will not, at the trial, allow an amendment of the statement of claim, so as to allege it, except on terms of paying all the costs; *Dobson v. Shire of Fern-tree Gully*, 17 V.L.R., 607.

2. When a writ of summons or any indorsement thereon is amended, the amendment shall be made in such manner as to distinguish the amendments from the original matter, and the writ shall be resealed. A copy thereof, as amended, shall be filed, unless the Court or Justice allows the amendment to be made upon the copy of the original already filed.

Amendment of writs of summons.

Q. Or. 32, r. 2.

As to amendment of indorsement on writ of summons, see Or. 4, r. 2. The indorsement of a writ of summons need not be amended though the claim in the statement of claim goes beyond the claim indorsed on the writ; Or. 16, r. 1.

3. The plaintiff may, without any leave, amend his statement of claim, or the indorsement on the writ when the indorsement is deemed to be the statement of claim, once at any time before the expiration of the time limited for reply and before replying, or when no defence is delivered at any time before the expiration of twenty-eight days from the appearance of the defendant who last appears.

Amendment of statement of claim by plaintiff without leave.
Cl., E. Or. 28, r. 2.

As to disallowance of such amendment, see r. 5, *infra*; as to statement of claim generally, see Or. 16; as to the time limited for a reply, see Or. 19, r. 1; as to introduction by amendment of matter formerly alleged by new assignment, see Or. 19, r. 5; as to computation of time limited by this rule, see Or. 45; no amendment of pleadings allowed in vacation unless directed by the Court or Justice, see Or. 45, r. 3.

4. A defendant who has pleaded a set-off may, without any leave, amend the set-off at any time before the expiration of the time allowed him for pleading to the reply, and before pleading, or, if the only reply is a joinder of issue, then at any time before the expiration of eight days from the delivery of the joinder of issue.

Amendment of set-off by defendant without leave.
Cl., E. Or. 28, r. 3.

As to disallowance of such amendment, see r. 5, *infra*; as to set-off generally, see Or. 14, r. 3; Or. 17, r. 11; as to time allowed for pleading to reply, see Or. 19, r. 3; as to computation of time limited by this rule, see Or. 45; no amendments of pleadings allowed in vacation unless directed by the Court or a Justice, see Or. 45, r. 3.

5. When any party has amended his pleading or indorsement under either of the last two preceding Rules, the opposite party may, within eight days after the delivery to him of the amended pleading or indorsement, apply to the Court or a Justice to disallow the amendment,

Disallowance of amendment.
E. Or. 28, r. 4.

or any part thereof, and the Court or Justice may, if satisfied that the justice of the case requires it, disallow the same, or may allow it subject to such terms as to costs or otherwise as are just.

As to computation of time limited by this rule, see Or. 45.

Pleading to
amended
pleading.

Ct., E. Or. 28, r.
5.

6. When any party has amended his pleading or indorsement under the last-mentioned Rules, the opposite party shall plead to the amended pleading or indorsement, or amend his pleading, within the time which he then has to plead, or within eight days from the delivery of the amendment, whichever last expires; and if the opposite party has pleaded before the delivery of the amendment, and does not plead again or amend within the time above-mentioned, he shall be deemed to rely on his original pleading in answer to such pleading as amended.

As to the times limited for the delivery of pleadings, see Or. 16, r. 4; Or. 17, rr. 6, 7; Or. 19, rr. 1, 3; as to computation of the time limited by this rule, see Or. 45.

Amendment by
leave.

E. Or. 28, r. 6.

7. In any case not provided for by the preceding Rules of this Order, application for leave to amend any pleading or indorsement may be made by either party to the Court or a Justice, or to the Justice at the trial of the action, and the amendment may be allowed upon such terms as to costs or otherwise as are just.

Failure to
amend after
order.

Ct., E. Or. 28,
r. 7.

8. If a party who has obtained an order for leave to amend any proceeding does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, the leave to amend shall, on the expiration of the time so limited, or of such fourteen days (as the case may be), cease to have effect, unless the time is extended by the Court or a Justice.

As to the computation of time limited by this rule, see Or. 45; as to the power of the Court to enlarge time, *ib.*, r. 6.

Clerical mistakes
and accidental
omissions.

Ct., E. Or. 28,
r. 11.

9. Clerical mistakes in judgments or orders, or errors appearing therein and arising from any accidental slip or omission, may at any time be corrected by the Court or a Justice on motion or summons, and an appeal shall not lie from an order directing such amendment.

As to power to amend generally, see H.C.P. Act, secs. 23, 24, r. 1, *supra*; as to relief against judgments, see Or. 34.

INHERENT JURISDICTION.—The Court has inherent jurisdiction to rectify its orders so as to make them consonant with the order actually pronounced: *Christie v. Newson*, 20 V.L.R., 28. See also note to *Jud. Act*, sec. 4, at p. 76.

CLERICAL MISTAKES.—The Court has jurisdiction to amend a judgment in which an error either by clerical mistake or pure accidental slip occurs; *Ronayne*

v. Austead, 12 A.L.T., 159. The application to rectify a judgment should be made promptly. The rule is intended only to apply to slight and plain clerical errors and to cases where the judgment as drawn up differs from that which the Court has pronounced; *Buchan v. Buchan*, 21 V.L.R., 391. Where an order was made without certifying for counsel an amendment was allowed; *Dougherty v. Dougherty*, 15 V.L.R., 294. In *Magor v. Donald*, 8 A.L.T., 55, an order incorrectly drawn up was varied by a supplemental order.

“ Their Lordships do not doubt that the Court has power, at any time, to correct an error in a decree or order arising from a slip or accidental omission, whether there is or is not a general order to that effect”; *per* Lord Hobhouse, *Carter v. Milson*, 14 N.S.W.L.R., at p. 239.

Where the judgment in an action has been given and the minutes of a declaratory order have been drawn, but the order itself has not been drawn up or taken out, the Court may hear a motion to vary the minutes of such order as a re-hearing and may thereupon alter such order; *Warnock v. Austin* (No. 2), 28 V.L.R., 632. It was held that an application to vary an order before it had been taken out might be granted; *In re Kinsey*, (1903) Q.W.N., 68. But where an order has been made after hearing both sides it cannot be varied; see note to r. 1, *supra*.

ORDER XXV.

SECURITY.

1. Security in General.

1. Whenever in any cause or matter in the High Court security is required to be given by or on behalf of any party, the security shall, unless otherwise required by law or by these Rules, or unless otherwise directed by the Court or a Justice, be given by an instrument in writing signed by the person to be bound, whether as principal or surety, and setting forth that he submits himself to the jurisdiction of the Court, and consents that, upon the happening of the event specified in the instrument, judgment may be signed against him for the amount for which the security is given.

As to the fees payable with respect to securities, see Rule of Court, October 6th, 1903; *sub-tit.* “Securities.”

2. The instrument shall be entitled in the cause or matter in which the security is given, and shall be executed by each person to be bound in the presence of a Registrar or a commissioner of affidavits, who shall satisfy himself that the person signing it understands the liability which he incurs and that the liability may be enforced against him in a summary way. The sureties may execute the instrument either together or separately.

A commissioner shall not attest a security on behalf of any person for whom he, or any person in partnership with him, is acting as solicitor or agent.

General form of security.
Q. Or. 33, r. 1.

Title.
Attestation.
A. R., 1894, rr. 17, 18, 22.
Q. Or. 33, r. 2.

Form of bond
for security.

Cf., E. Or. 65,
r. 7.

3. When a bond is ordered to be given as security, it shall, unless the Court or Justice otherwise orders, be given to the party for whose benefit it is given.

Two sureties
required.

A.R., 1894, r. 16.

Q. Or. 33, r. 4.

4. The security shall, unless otherwise directed by Rules of Court, or unless otherwise ordered by the Court or a Justice, be given by two sureties, who shall be approved by the Registrar of the Registry in which the cause or matter is pending, and each of whom shall be bound in the full amount of the security.

Security to be
filed of record.

Q. Or. 33, r. 10.

5. Every instrument of security made under this Order shall be filed, and shall thereupon become a record of the Court.

As to time of filing, see r. 7, *infra*.

The fee payable on filing an instrument of security is 5s. ; Rule of Court, October 6th, 1903.

Enforcement of
security.

Q. Or. 33, r. 11.

6. Any party claiming to be entitled to enforce the security against any person by whom it is signed may apply to a Justice by summons in the cause or matter in which the security is given for an order that judgment be entered against the person by whom the security is given in accordance with his submission, and the Justice may order that judgment be entered accordingly in favour of the party for such amount as is just.

To be filed
within six
months.

Cf., E. Or. 61,
r. 14.

7. No such instrument, and no recognizance or other security of any kind, shall be filed after the expiration of six months from the time of its execution, except by order of the Court or a Justice, made upon notice to all the persons by whom the security was executed or their representatives.

The term "month" means calendar month ; *Acts Interpretation Act* 1901, sec. 22 (b).

Payment into
court in lieu of
security.

Q. Or. 33, r. 13.

8. Any party directed to give security may give it by paying the amount for which security is to be given into Court to a separate account in the cause or matter, to be called the "Security Account," and to abide the order of the Court, and giving notice of the payment to the party for whose benefit the security is to be given. The notice shall be accompanied by an original receipt for the money paid into Court.

As to payment into Court, see Or. 18.

2. Security for Costs.

Security for
costs of
plaintiff and
counterclaiming
defendant.

9. A plaintiff ordinarily resident beyond the Commonwealth may be ordered to give security for the costs of the cause, whether he is or is not temporarily within the Commonwealth.

As to security by receiver, see Or. 37, rr. 12, 13; as to security for costs on issue of writ of *certiorari*, see Or. 41, r. 10; security for costs on filing information of *quo warranto*, see Or. 41, r. 33; as to when time for giving security for costs not to be reckoned, see Or. 45, r. 5; as to security generally on appeals to the High Court, see H.C.P. Act, secs. 35, 36; as to giving security for costs of appeal from a State Supreme Court in the Court appealed from, to High Court; see Part II., sec. iv., r. 10, and notes thereto.

Cf., E. Or. 65,
r. 6a.

As to the amount of security to be given, see rr. 11, 12, *infra*; as to the time at which an application for security for costs should be made, see r. 13, *infra*; as to power of Court or a Justice to require security for costs in any case, see r. 17, *infra*; when time for giving security for costs not to be reckoned, see Or. 45, r. 5; as to costs generally, see Or. 46, *Jud. Act*, secs. 26, 27.

A plaintiff who had unencumbered real property within the jurisdiction was not required to give security for costs although he was not resident within the jurisdiction; *Nicholson v. Shaw*, 3 S.C.R. (Q.), 167. Goods within the jurisdiction which are the subject-matter in dispute cannot be considered as security for the costs of the action, but the nature and circumstances of the claim will be taken into consideration in fixing the amount of the security to be given. A plaintiff, resident in Queensland, who, after the issue of a writ of summons, left the State in order to proceed to England and reside there permanently, was ordered to give security for costs, although at the time of the application she was temporarily resident in another part of the Commonwealth; *Stenger v. Mathias*, (1903) S.R. (Q.), 131. Where a plaintiff who was out of the jurisdiction was ordered to give security for costs, returned and stated he had no present intention of leaving the colony, it was held he was entitled to be relieved from the operation of the order; *Wood v. Sheriff of Queensland*, 6 Q.L.J., 163. *Semble*, when the terms of an order for security of costs have by a change of circumstances in the course of an action become unsuitable, the Court has power to vary the order, although no liberty to apply has been reserved; *Deep Creek Gold Dredging Co. v. Gympie Crushing Co.*, 8 Q.L.J., 123.

Where a plaintiff, out of the jurisdiction, resided in a colony where by the law in force in that colony a judgment obtained in the colony in which the action was brought, could be registered and enforced in the colony where the plaintiff resided, security could not be ordered by the State Court; *Martin v. Fraser*, 19 A.L.T., 169; *Austral Cycle Agency Ltd. v. McCrae*, 25 V.L.R., 42. In Queensland, before the establishment of the Commonwealth, security for costs of an action was not required from a plaintiff resident in a colony subject to the *Federal Council Act*; *Hayter v. Brewer*, 3 Q.L.J., 19. See now sec. 10 of the *Service and Execution of Process Act* 1901, and cases decided thereunder; *Ramsay v. Eager*, 27 V.L.R., 603; *Evans v. Sneddon*, 28 V.L.R., 396.

As to the practice and authorities with respect to applications for security for costs in New South Wales, see *Rolin and Innes, Supreme Court Practice*, p. 153; *Rich, Newham and Hurvey, Practice in Equity*, p. 200.

10. When a plaintiff, who has been ordered to pay the defendant the costs of a cause whether in the High Court or another Court, institutes a fresh cause in the High Court against the same defendant

Second action
for same cause.
Q. Or. 33, r. 15.

in respect of the same, or substantially the same, cause of action, the Court or a Justice may order him to give security for the costs of the fresh cause.

As to staying subsequent action until costs of first action paid, see Or. 38, r. 5.

Security to be given.
E. Or. 63, r. 6.

11. When security for costs is ordered to be given, the security shall be of such amount and shall be given at such times, and in such manner, as the Court or a Justice directs.

FURTHER SECURITY.—Under Or. 65, r. 6 (Vic.), it was held that the Court had a general discretion to make an order that further security should be given for the defendant's costs or not, and where the facts justified a further order such order could be made; *Balance v. Smith*, 17 A.L.T., 155.

12. The amount of security shall, unless the Court or a Justice otherwise orders, be Fifty pounds.

Amount of security.
Ct., E. Or. 65, r. 6.

As to amount of security, see also H.C.P. Act, sec. 35; as to increase or decrease of amount on appeal; *ib.*, sec. 36. Applications for increase must be made with expedition, whether there is a Justice of the High Court sitting in a State where the appeal is to be heard or not; *McLaughlin v. Daily Telegraph*, 1 C.L.R.

Time for application.
Q. Or. 33, r. 19.

13. An application to compel the plaintiff in an action to give security for costs must, in ordinary cases, be made before issue joined: But the Court or a Justice may, under special circumstances, allow the application to be made at any later time.

Staying proceedings.
Q. Or. 33, r. 20.

14. When a party is ordered to give security for costs, the action, or other proceeding in respect whereof the security is required to be given, shall be stayed until the security is given, unless the Court or a Justice otherwise orders.

As to staying proceedings generally, see Or. 38; as to when time for giving security for costs not to be reckoned, see Or. 45, r. 5.

Disposal of money paid into court.
Ct., E. Or. 31, r. 27.

15. In any case in which money has been paid into Court as security for costs, when the cause has been finally disposed of, if the party by whom the payment into Court was made is adjudged to pay the costs of the cause, or any balance in respect of the costs of the cause, or any other balance of costs in the cause, to any parties for whose security the payment was made, the amount standing to the credit of the "Security Account" in the cause shall, unless the Court or a Justice otherwise orders, be liable to be applied in payment of the costs so ordered to be paid to those parties. In any other case the party by whom the payment into Court was made shall be entitled to have the sum paid out to him.

As to payment of moneys into Court, see Or. 18.

16. When a cause has been finally disposed of by consent or otherwise the Registrar shall, on the application of any party to the cause, and on being satisfied that that party is entitled to have any money standing to the credit of the "Security Account" paid out to him, give him a certificate to that effect. Registrar to certify at conclusion of cause. Cf., E. Or. 31, r. 27a.

17. Nothing in the eight last preceding Rules shall be construed to affect the power of the Court or a Justice to require security for costs to be given by any party to any cause or matter in any case in which it is just that such security should be given. Saving. Q. Or. 33, r. 23.

As to giving of security by plaintiff ordinarily resident beyond the Commonwealth, see r. 9, *supra*.

WITHOUT MEANS.—Where a plaintiff without means is bringing an action merely as the nominee of another person, he may be ordered to give security for costs; *Macaulay v. Macaulay*, 21 V.L.R., 224. A no-liability company stands in the same position as an individual, and will not be ordered to give security for costs of an action on the ground of poverty; *Mount Delegate Co. No Liability v. Teague*, 16 V.L.R., 772; cf. also. *Mackie v. Clough*, 17 V.L.R., 201. In an action for slander an order was refused directing the plaintiff who had been adjudicated insolvent after action brought to give security for the defendant's costs; *Wilson v. Donkin*, Queensland Dig., col. 60.

APPEAL FROM A JUSTICE OF THE HIGH COURT.—Security can only be required under an order of the High Court; H.C.P. Act, sec. 35. In Queensland it is not the practice of the Court to require security for costs on an application for a new trial, or an appeal, except under very exceptional circumstances; *Union Bank of Australia Ltd. v. Raine*, 6 Q.L.J., 58. Per Griffith, C.J., *Deep Creek Gold Dredging Co. v. Gympie Crushing Co.*, 8 Q.L.J., at p. 125. In Victoria the general rule is that security for costs must be given by an appellant who is apparently without means to pay costs if unsuccessful. The fact that the appeal involves a novel question of law is not sufficient ground for dispensing with security; *Symes v. Crisp*, 17 A.L.T., 32. (See Vic. Or. 58, r. 15). See further as to the Victorian practice, *Cane v. The Perpetual Trustees Co.*, 26 V.L.R., 245; *Arona v. McInerney*, 25 V.L.R., 148; *Hitchins v. Mayor of Port Melbourne*, 15 V.L.R., 358; *Bethune v. Porteous*, 18 V.L.R., 493; *The Australian Compressed Fodder Co. v. Westwood*, 9 A.L.R., 113. In Victoria it has been held that the Full Court has no jurisdiction to order security for costs of a motion for the new trial of an action which has been tried by a Judge with a jury; *Jacob v. Miles*, 25 V.L.R., 215. Compare on this point the practice in West Australia; *Tipping v. Mayor of Perth*, 2 W.A.L.R., 36.

ORDER XXVI.

DISCOVERY AND INSPECTION.

1. In any cause the plaintiff or defendant may at any time before the plaintiff is in a position to give notice of trial, or at any later time by leave of the Court or a Justice, deliver interrogatories in writing for the examination of the opposite parties or any of them; and the interrogatories when delivered shall have a note at the foot thereof, Discovery by interrogatories. Cf., E. Or. 31, r. 1.

stating which of the interrogatories each of the parties is required to answer : Provided that no party shall deliver more than one set of interrogatories to the same party without a special order for that purpose.

Interrogatories which do not relate to any matters in question in the cause shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

As to power of High Court or Justice to order the examination of any person on interrogatories, see H.C.P. Act, sec. 19 ; as to interrogatories on summons for directions, see Or. 12, r. 2 ; interrogatories may be administered to an accused person touching his contempt ; see Or. 43, r. 6.

ADMISSIONS.—“ It is one of the well recognized objects for which interrogatories are allowed, that admissions may be obtained to aid the case of the interrogating party, and to impeach or destroy the adversary's case ” ; *Broken Hill Proprietary &c. v. Municipal District of Broken Hill*, (1901) S.R. (N.S.W.) (E.), at p. 55. A plaintiff may administer to the defendant interrogatories which may prove his whole case out of the defendant's mouth, and may do so although he shows that he has already knowledge and evidence of the matters on which the defendant's answers are sought ; *James v. Davies*, 9 V.L.R., 140. A party interrogated is not bound to state the nature of his belief as to the matter inquired after, if such belief is founded on the perusal of documents not admissible in evidence. An admission by a party interrogated of particular belief is tantamount to an admission of fact ; *Shannon v. Whiting*, 22 A.L.T., 186.

INFORMATION.—“ There is another ground on which interrogatories are often allowed, i.e., when they are in the nature of a summons for further and better particulars ; *Millbank v. Millbank*, (1900), 1 Ch., 276 ” ; *Broken Hill Proprietary &c. v. Municipal District of Broken Hill*, (1901) S.R. (N.S.W.), at p. 56.

An interrogatory will not be allowed the only object of which is to ascertain the nature or strength of a party's evidence or to pin the party down to a definite statement in that respect. An interrogatory was, therefore, disallowed as to the number of persons present at an alleged agreement between the defendant and a deceased person, where the number of such persons was immaterial to the issues in the suit ; *McKenzie v. Davison* (1903), 3 S.R. (N.S.W.), 273.

A plaintiff is entitled to discovery of the facts upon which the defendant relies to establish his case, or of what the case is that he has to meet, but not of the evidence which it is proposed to adduce ; *McKinley v. Robinson*, 14 V.L.R., 195 ; *Cameron v. Cameron*, 7 W.N. (N.S.W.), 29.

Where the defendant has given to the plaintiff a written notice of his intention to apply at the trial for leave to amend his defence, the plaintiff, before the trial, cannot interrogate him with regard to the subject-matter of the proposed amendment ; *Grassmere Estate Co. v. Illingworth*, 11 A.L.T., 45.

In a suit to restrain a defendant from passing off his goods as the goods of the plaintiff, the plaintiff alleged in his statement of claim that he had sold or consigned to merchants and storekeepers in the colony large quantities of goods branded with a certain mark, which defendant had copied, thereby deceiving the

public into purchasing the defendant's goods. The Court refused the defendant leave to interrogate the plaintiff as to the names and addresses of the merchants and consignees, or as to the quantities sold, but allowed the interrogatories as to the districts, cities and towns in which the sales had been made, and the names and addresses of the members of the public who had been deceived; *Blogg v. Anderson*, 21 N.S.W.L.R. (Eq.), 9.

Where an answer would be irrelevant, and would not go to support the plaintiff's case, the interrogatory should not be allowed. In Victoria it has been held that in an action against the publisher of a newspaper to recover damages for a libellous letter, interrogatories asking whether the defendant, if not himself the writer, knows the name and address of the writer, will not be allowed; *Smith v. Powell*, 10 V.L.R. (L.), 79. See also *Daily Telegraph Co. v. Berry*, 5 V.L.R. (L.), 343.

In an action for the residue of the purchase money of a station, the defendant pleaded a deed of composition, executed in accordance with the *Insolvency Statute* 1865. The plaintiff did not reply fraud. It was held that interrogatories asking in what manner, and at whose instigation, the assent of the creditors and the execution of the deed were obtained, and other particulars concerning such composition, which appeared to point towards impeaching the deed, should not be allowed; *Stewart v. Hogg*, 1 V.L.R. (L.), 139.

A party is not entitled to interrogate another as to his motives for doing a certain act; *Service v. Coote*, 17 V.L.R., 40.

SERVANTS AND AGENTS.—When interrogatories are administered to a defendant appointed by the Government, in a suit against the Crown, the Government are not required for the purpose of answering such interrogatories to inquire into the knowledge on the subject in question possessed by their various officers; *Fisher v. Tully*, 3 S.C.R. (Q.), 194.

An answer to an interrogatory may be sufficient if it negatives personal knowledge on the part of the person interrogated of an act done by a servant or agent, and states that the person who was his servant or agent at the time that such act was supposed to have been done is no longer his servant or agent or under his control, or in such a position that it would not be reasonable to force him to communicate with such servant or agent. *Quære*, whether the termination of the agency or service is of itself sufficient in any particular case to relieve the person interrogated of the obligation to make inquiries of his former agent or servant; *Little v. T. K. Bennet & Woolcock Ltd.*, 25 V.L.R., 645.

A person interrogating can only require the interrogated party to make inquiries from his servants or agents as to what his servants or agents know or did in the ordinary course of their employment; *McMeckan v. Aitken*, 17 V.L.R., 301. When the party interrogating asks as to the knowledge and information of the servants and agents of the interrogated party, he is entitled to have a distinct statement in the answer to such interrogatories, that the party interrogated has made inquiries from his servants and agents; *The City Newspaper Co. Ltd. v. The Evening Standard Newspaper Co.*, 17 V.L.R., 368.

PAYMENT INTO COURT.—In an action for trespass, interrogatories, referring to the extent of a paddock and the number of stock, were allowed for the purpose

of enabling the defendant to pay money into Court and for the purpose of showing that the sum so paid in was sufficient; *Carew v. Lambell*, 15 V.L.R., 260.

A defendant, however, will not be allowed to deliver interrogatories before defence for the purpose of ascertaining the amount of damages to pay into Court where there is a denial of liability; *Kraitzer v. Jenkins*, 17 V.L.R., 42.

SECOND SET.—In Victoria in the absence of very special circumstances a second set of interrogatories will only be allowed upon payment by the applicant of all costs; *Elder Smith & Co. v. McKellar*, 1 A.L.R., 22; and the application for leave to deliver a second set of interrogatories may be made *ex parte*; *McEacharn v. Chapman*, 22 A.L.T., 2.

TIME FOR APPLICATION.—Under the Rules of the Supreme Court of Queensland it was held that the plaintiff is entitled to deliver interrogatories before the delivery of his statement of claim, and such interrogatories should be answered unless the defendant shows good cause to the contrary or for adjourning the application; *Ramsay v. Halloran*, (1902) Q.W.N., 87. In Victoria it has been held that a party may apply at any time for leave to deliver interrogatories, and an affidavit explaining the delay in case the application is not made until after the close of pleadings, is not necessary; *Carr-Boyd v. Johnson*, 7 A.L.T., 75. An application for interrogatories is not a "proceeding" and can be made although all proceedings in the action are ordered to be stayed; *Peck v. Land Mortgage Bank*, 6 A.L.T., 268.

AFFIDAVIT.—In Victoria it has been held that on an application for leave to deliver interrogatories an affidavit in support is unnecessary; *Watkins v. Whiting*, 8 A.L.T., 11.

THE ORDER.—In Victoria in applications for leave to administer interrogatories the order may be made (a) generally; or (b) limited to a particular matter or subject of inquiry; (c) or subject to the interrogatories being submitted to the Judge for his approval before delivery; *In re Interrogatories*, 24 A.L.T., 99.

STAY OF PROCEEDINGS.—Where an action was set down for trial an application to stay proceedings until certain interrogatories sought to be delivered were answered and discovery made by the opposite party was refused; *Phipps, Turnbull & Co. v. Gillespie Bros.*, 9 A.L.T., 40. Where a plaintiff resident in England was ordered to answer interrogatories a stay of proceedings for eighty days was ordered; *Stibbard v. The Dominion Banking and Investment Corporation Ltd.*, 16 A.L.T., 222.

SETTING ASIDE.—In Victoria it has been held that a Judge has no power to set aside interrogatories on the ground that the pleadings on which such interrogatories are based disclose no valid ground of relief, unless such pleadings are clearly bad in law; *Stibbard v. The Dominion B. and I. Co.*, 16 A.L.T., 222. An interrogatory in the form "do you allege" will be struck out as embarrassing; *Corsair Consolidated Co. v. Gray*, 5 A.L.R., 115. A party is not entitled to interrogate the opposite party as to what he says or alleges; *Booth v. Attenborough*, 21 A.L.T., 205. But see *Burke v. McEacharn*, 25 V.L.R., 657.

As to the practice generally in New South Wales with respect to interrogatories, see *Rich Neicham and Harney, Practice in Equity*, p. 132.

2. In adjudging the costs of the cause, inquiry shall, at the instance of any party, be made into the propriety of exhibiting any interrogatories, and if it is the opinion of the Court or a Justice upon the report of the taxing officer, or without such report, and either with or without an application for inquiry, that the interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the interrogatories and the answers thereto shall be paid in any event by the party in fault.

Costs of interrogatories.
Ct., E. O. 31,
r. 3.

Costs of a motion for further and better answers to interrogatories, which was refused on the ground that the answers would tend to incriminate, were made costs in the cause; *Attorney-General v. Simpson*, 5 S.C.R., (Q.), 98. Applications under the Rule 3* (Vic.) as to costs should be made to the Judge who finally deals with the cause, and no such costs shall be allowed by the taxing officer without an order from such Judge; *In re Interrogatories*, 24 A.L.T., 99.

3. If any party to a cause is a corporation or a joint stock company, or any body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to be answered by some member or officer of the corporation, company, or body, on their behalf, and an order may be made accordingly.

Corporations.
E. O. 31, r. 5.

As to discovery by corporations, see r. 9, *infra*.

CROWS.—In proceedings taken on behalf of the Queen under the *Crown Remedies and Liability Statute* 1865 (Vic.), the defendant has no power to interrogate the Queen or any officers in her service; *Reg. v. The National Insurance Co.*, 13 V.L.R., 301. But see *Jud. Act*, sec. 64; *Fisher v. Tully*, 3 S.C.R. (Q.), 194.

AGENT.—A Judge has no power to allow an agent to answer for a party when such party does not come within the terms of the rule; *Stibbard v. The Dominion Banking and Investment Corporation Ltd.*, 16 A.L.T., 222.

OFFICER.—Where a company is directed to answer interrogatories through its officer nominated for that purpose in the order, such officer is bound to give the information sought by the other party; and where through dismissal or death of such officer, or for any other reason, the company is unable to answer the interrogatories by that officer, it is the duty of the company to come before the Court and state that it is unable to obey the order of the Court, and to suggest the name of some other officer for that purpose; *The Old Welshman's Reef G.M. Co. v. The Welshman's G.M. Co.*, 14 V.L.R., 253.

4. Interrogatories shall be answered by affidavit to be filed within twenty-eight days after delivery of the interrogatories, or within such other time as the Court or a Justice allows.

Answer by affidavit.
Ct., E. Or. 31,
r. 3.

A copy of the affidavit shall be delivered to the interrogating party on the same day on which it is filed.

As to using interrogatories at trial, see r. 22, *infra*; as to computation of time limited by this rule, see Or. 45.

Objections to interrogatories by answer.
Of., E. Or. 31, r. 6.

5. An objection to answering any interrogatory, whether on the ground that it is scandalous or irrelevant, or is not delivered *bond fide* for the purpose of the cause, or that the matters inquired into are not sufficiently material at that stage of the cause, or on any other ground, may be taken in the affidavit.

CRIMINATORY OR PENAL.—The object of an information filed by the Attorney-General against S. and others was to obtain a declaration that certain Crown lands were acquired by S. contrary to the provisions of *The Crown Lands Alienation Act of 1868*. Interrogatories having been administered to the defendants, S. by his answer set up his right to protect himself from pains, penalties and forfeiture by refusing to make specific answer to the information and interrogatories. It was held that in order to entitle the plaintiff to the relief claimed, it would be necessary to prove facts by reason of which S. would incur a forfeiture of the land under sec. 128, and be liable to a prosecution for misdemeanour under secs. 127, 129. S. could not be compelled to make a further and better answer; *Attorney-General v. Simpson*, 5 S.C.R. (Q.), 98. Compare the Victorian practice as to objections on the ground that the answer might criminate; *Smith v. Powell*, 10 V.L.R. (L.), 79; *Guthrie v. Guthrie*, 15 V.L.R., 612; 16 V.L.R., 280. The Judge must decide when the objection is taken whether in his opinion the question may have a tendency to criminate; *Anderson v. Douglas*, 18 V.L.R., 5. The objection will not be allowed unless the party himself makes an affidavit that the answer might criminate; *Smith v. Powell*, 10 V.L.R. (L.), 79.

No exception to be taken.
E. O. 31, r. 10.

6. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or a Justice on motion or summons.

As to order to answer or further answer, see r. 7, *infra*.

Order to answer or answer further.
E. O. 31, r. 11.

7. If any party interrogated omits to answer, or makes an insufficient answer to any interrogatory, the party interrogating may apply to the Court or a Justice for an order requiring him to answer, or to make further answer, as the case may be. An order may thereupon be made requiring him to answer, or make further answer, either by affidavit or upon oral examination, as the Court or Justice directs.

As to what interrogatories are to be answered, and in what manner, see r. 1, *supra*, and cases thereunder; as to using answer at trial, see r. 22, *infra*.

Where an answer to an interrogatory was qualified by a condition which was, by order of a Judge in Chambers, by consent, struck out, it was held that the answer as altered need not be re-sworn; and also that the deponent could not contend that the answer as altered was not his answer; *Cayron v. Russell*, 24 V.L.R., 69.

Where an answer to interrogatories stands apart from the other answers, an application to strike it out as irrelevant is unnecessary. In such a case the question of relevancy should be left to the Judge at the trial; *Bennett v. Morris*, 9 A.L.T., 10. *Smilde*, the summons calling upon the party interrogated to answer

further should specify the particular answers objected to; *ib.*; but need not specify the particulars of the objections to such answers; *Smith v. Ison*, 10 A.L.T., 4.

A party in his answers to interrogatories cannot incorporate paragraphs of the defence by reference thereto, so that the other side cannot use the answer without adopting these paragraphs; *McKinley v. Robinson*, 14 V.L.R., 195.

A defendant cannot be compelled in his answer to give his opinion upon the construction of the terms of a deed; *Looker v. Murphy*, 15 V.L.R., 348.

After a party has obtained an order for discovery of documents, he cannot, as a general rule, interrogate the opposite party concerning such documents. But there may be cases where, on special grounds, such an interrogatory, directed to a particular document, will be permissible; *Danby v. Australian F. A. & G. Co.*, 17 V.L.R., 156.

Where the only information possessed by a party to an action has been obtained from and is the result of the efforts of his solicitor and has been obtained in the course and for the purposes of the action, it was held that such information was privileged; *Thwaites v. Bank of Australasia*, 21 V.L.R., 222.

Where the interrogatories delivered are too wide, the party interrogated is not bound to find out and answer the questions which are relevant; *Cayron v. Crevelli*, 18 A.L.T., 83.

Where an administratrix claiming damages for loss occasioned by the death of her son refused to answer an interrogatory as to the amount of damage sustained, an application for an order requiring the plaintiff to answer was granted; *Cross v. The Victorian Railway Commissioners*, 4 A.L.R. (C.N.), 26.

8. Any party to a cause may, without any affidavit, apply to the Court or a Justice for an order directing any other party to the cause to make discovery on oath of the documents which are or have been in his possession or power, relating to any matters in question in the cause. On the hearing of the application the Court or Justice may make such order, either generally or limited to certain classes of documents, as in their discretion seems fit, or may adjourn the application:

Application for discovery of documents.
E. O. 31, r. 12

Provided that discovery shall not be ordered, if and so far as the Court or Justice is of opinion that it is not necessary, either for disposing fairly of the cause or for saving costs.

As to affidavit of documents and filing and delivery, see r. 10, *infra*; as to effect of failure to comply with an order for discovery, see r. 19, *infra*.

One defendant cannot obtain discovery of documents in an action from a co-defendant. The rule only provides for discovery between opposite parties; *Cameron v. Purves*, 7 A.L.T., 133. It was held in Victoria, in *Rees v. Dunbar*, 14 V.L.R., 645, that the Judge had jurisdiction to make an order *ex parte* for the discovery of documents, and to direct that costs of the application for such order be costs in the cause. In *Barnes v. James*, 22 A.L.T., 138, it was held that, in applications for discovery of documents the applicant must give notice to the other side, or, at all events, he must satisfy the Judge that the discovery is necessary, and that application has been made to the other side for it. Discovery will not be granted as of course; *Greenfield v. Yeo*, 1 A.L.R., 25.

Where an *ex parte* order for discovery has been obtained the other party has the right, in any subsequent proceedings, to object to it as having been made on insufficient grounds, or as being unnecessary; *e.g.*, such an objection might be taken in Victoria on a summons for dismissal of action for want of prosecution, because the order has not been complied with; *Corsair C. G. M. Co. Ltd. v. Gray* (No. 2), 24 V.L.R., 829.

To warrant an order for further discovery of documents, the applicant must show more than that, from the documents disclosed in the affidavit of documents, it appears probable that there are other documents not disclosed; the probability must be so strong as to outweigh the oath of the deponent. An order for leave to interrogate as to further documents will not be made on the mere speculation of the existence of undiscovered documents—there must be some proof of their existence; *Martell v. The Victorian Coal Miners Association*, 28 V.L.R., 643.

A defendant in an action of libel who pleads the general issue is not entitled to an order for discovery to enable him to cut down the damages; *The Co-Operative Coupon Co. Ltd. v. J. Inglis & Co. Ltd.*, 20 W.N. (N.S.W.), 233.

ORDER BEFORE PLEADING.—Although the Court has jurisdiction to make an order for the discovery, by production of documents at any stage of an action, such order will not be made before delivery of statement of claim, except on very clear and express material. An application made for production of a deed in an action for the revocation of a deed for the purpose of enabling counsel to draw a statement of claim was refused; *MacKellar v. MacKellar*, 23 V.L.R., 646.

An order for discovery was, on the application of the plaintiff, made *ex parte* after the defendant had entered an appearance, but before delivery of statement of claim. No special grounds for applying at that stage were shown. On application by defendant to set aside the order it was held that the order should stand but defendant need comply therewith until seven days after he had delivered his defence; *Nathan v. Ryan*, 18 A.L.T., 69.

TRIAL WITHOUT PLEADINGS.—Where trial is intended to be held without pleadings the practice in Victoria was held to be that an application for discovery of documents must be on summons giving notice to the other side that it is unnecessary to appear unless to object to the order sought. On the return of the summons the order will be made unless an objection is raised; *Phillips v. Johnston*, 23 A.L.T., 19. See also, *Barnes v. James*, 26 V.L.R., 421.

As to the practice in New South Wales with respect to discovery, see *Rich, Neicham and Harvey, Practice in Equity*, pp. 42, 133.

Discovery by corporations.
Q. Or. 35, r. 11.
Ct., E. Or. 31, r. 5.

9. If the party from whom discovery is sought is a corporation or a joint stock company, or any body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, the application may be that the party, corporation, company, or body, shall make the discovery by the affidavit of some member or officer of the corporation, company, or body and an order may be made accordingly.

As to interrogatories to a corporation, see r. 3, *supra*; as to affidavit of documents under this rule, see r. 10, *infra*.

An order that a corporation shall deliver answers to interrogatories by its manager does not operate as an order which subjects the manager to process for contempt unless the manager is expressly ordered to answer them; *Old Welshman's Reef G.M. Co. v. Welshman's G.M. Co.*, 9 A.L.T., 213.

The Court will not suppose nor infer that its order has been disobeyed but requires an explicit statement of the facts constituting the alleged contempt; *McLeod v. Henty*, 25 V.L.R., 648.

10. The party or person required to make discovery under either of the two last preceding Rules shall make or procure to be made an affidavit giving the required discovery as to all such documents as are or have been in the possession or power of the party relating to the matters in question in the cause, in which affidavit shall be specified which, if any, of the documents therein mentioned the party objects to produce.

Affidavit of documents.
Cl., E. Or. 31,
r. 13.

The affidavit shall be filed, and a copy thereof shall be delivered to the opposite party on the same day on which it is filed.

As to special order for discovery after delivery of affidavit of documents, see r. 15, *infra*.

AFFIDAVIT OF DOCUMENTS.—In no case is it necessary for a party giving discovery to describe the nature of the documents in the schedule to his affidavit. It is sufficient in every case to tie the documents up in bundles and refer to them as a bundle marked A and numbered 1 to 350 and initialled by the deponent. *O'Brien v. McKenzie*, 21 N.S.W.L.R. (E.), 117. See also *Miller v. Kennedy*, 14 A.L.T., 37.

Where a defendant's affidavit of discovery claims protection for documents in his possession and relating to the matters in issue, on the ground that they relate solely to his own case and do not in any way tend to prove or support the case of the plaintiff, it is not necessary to state that the defendant intends to use the documents in evidence at the hearing. *Quære*, whether it is necessary for the affidavit to state that such documents do not contain anything tending to impeach the case or title of the defendant; *Allen v. City Bank of Sydney* (1902), S.R. (N.S.W.) (E.), 143.

EXTENSION OF TIME.—A defendant is entitled to a reasonable extension of time for filing an affidavit of discovery where original documents are out of the jurisdiction, and is not bound to accept an offer by plaintiff to supply copies, but the applicant should pay the costs of the summons in any event; *Gourlay v. Equitable Life Assurance Society*, 1 A.L.R., 24. The fact that the parties are at arms' length months before writ issued will not be regarded on an application for such extension; *ib.*

11. The Court or a Justice may, at any time during the pendency of any cause, order the production by any party thereto, upon his oath, or in the case of such parties as are mentioned in Rule 9 of this Order, upon the oath of some member or officer, of such of the documents in the possession or power of the party relating to any matter in question

Production of documents.
Cl., E. Or. 31,
r. 14.

in such cause, as the Court or Justice thinks fit; and the Court or Justice may deal with such documents, when produced, in such manner as is just.

Rule 9 refers to a corporation, a joint stock company, or any body of persons empowered by law to sue or be sued; as to production of documents for inspection, see rr. 12, *et seq.*, *infra*; as to order on refusal to produce or allow inspection of documents, see r. 14, *infra*; as to non-compliance with order for discovery, see r. 19, *infra*; as to order for attendance of person to produce documents, Or. 31, r. 2; as to attendance of witness under subpoena to produce documents, Or. 31, r. 12; as to order by Court to produce books and writings, H.C.P. Act, s. 17.

PRIVILEGE.—Communications to a solicitor are *prima facie* privileged if made to him in his capacity as solicitor, although they may not have been made either during or relating to an actual or contemplated litigation; *Haydon v. McLeod*, 26 V.L.R., 452.

Production of muniments of title was refused, as before the Judge in the particular case could decide whether the case was a fit one in which to order production, both parties should have pleaded; *Aitken v. Ettershank*, 6 A.L.T., 221. Reports of medical men and of defendant's servants made in order to help him to establish his defence are privileged; *Mummery v. Victorian Railway Commissioners*, 9 A.L.T., 21. See also *Williams v. Railways Commissioner*, 19 W.N. (N.S.W.), 300.

Plaintiff sued for damages through negligent and defective construction of the defendant's waterworks. After plaintiff had complained of the injury, but before actual litigation, the defendants sent their surveyors to report on the work and the damage created thereby. Upon receipt of the reports, certain resolutions were adopted by defendants and entered in their minute book. It was held that these documents were not privileged and should be produced; *Beattie v. Echura Trust*, 14 V.L.R., 794.

Where after the usual consent order for discovery a defendant made an affidavit of discovery disclosing certain documents relating to the matters in issue, but omitted to claim protection for them; but subsequently and after the time limited by the order for making discovery claimed protection: Held (1) that he was not estopped by his previous omission, and (2) that the Court would not for that reason alone go behind the oath of the defendant, on the ground that it was reasonably certain that the defendant had misrepresented or misconceived the nature of such documents; *Allen v. City Bank of Sydney* (1902), S.R. (N.S.W.) E., 143.

CROWN.—In New South Wales in a suit in Equity against a nominal defendant appointed under the *Claims against the Colonial Government Act* the plaintiff is entitled to an order directing the defendant to file an affidavit of discovery of documents; *Ricketson v. Smith*, 16 N.S.W.L.R. (E.), 170. The nominal defendant in an action at law may be ordered by the Court of Equity to give discovery to the plaintiff in a suit for discovery in aid of the action at law; *Morrissey v. Young*, 17 N.S.W.L.R. (E.), 157. Compare also *Jud. Act*, sec. 64.

OFFICIAL COMMUNICATION.—Official communications from a friendly power to its accredited agent in Victoria, and which were intended for transmission to the Government in that State together with other papers passing between that

agent and the Government of Victoria, all the papers being sent with the purpose of assisting the criminal administration of the foreign power, were held to be privileged, and the Court would not order their production on the ground that it would be against public policy, and would be injurious to the due administration of justice; *Spitzel v. Beckx*, 16 V.L.R., 661.

12. Any party to a cause may, at any time, by notice in writing, require any other party in whose pleadings, particulars, or affidavits, reference is made to any document, to produce the document for the inspection of the party giving the notice, or of his solicitor, and to permit them to take copies thereof.

Inspection of documents referred to in pleadings or affidavits.
Ct., E. Or. 31, r. 15.

Any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in the cause, unless he, being a defendant in the cause, satisfies the Court or Justice that the document relates only to his own title, or unless he satisfies the Court or Justice that he had some other sufficient ground for not complying with the notice.

As to order for inspection of documents, see r. 14, *infra*; as to notice to admit facts or documents, see Or. 27, r. 2.

13. A party to whom notice to produce documents is given shall, within two days from the receipt of the notice, if all the documents therein referred to have been set forth by him in the affidavit made under Rule 10 of this Order, or within four days from the receipt of such notice, if any of the documents referred to in the notice have not been set forth by him in any such affidavit, deliver to the party giving the notice to produce a notice stating a time within seven days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which, if any, of the documents he objects to produce, and on what ground.

Time and place for inspection.
Bank and trade books.
Ct., E. Or. 31, r. 17.

As to order for inspection, see r. 14, *infra*; as to computation of times limited by this rule, see Or. 45.

14. If a party served with notice under the last preceding Rule omits to give such notice of a time for inspection, or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the Court or Justice may, on the application of the party desiring it, make an order for inspection in such place and in such manner as they think fit.

Order for inspection.
Ct., E. Or. 31, r. 18 (1).

As to order of verified entries in lieu of inspection, see r. 16, *infra*; as to the determination of an issue or question before the decision upon the right to discovery or inspection, see r. 18, *infra*.

INSPECTION.—L. obtained a consent order to inspect documents in the possession of the defendant, and, finding he would require professional assistance, applied to the defendant to be allowed to bring an accountant with his solicitor's clerk. The defendant refused on the ground that the proposed accountant was hostile to him. It was held that L. had a right to bring the accountant to inspect: *Lancaster v. Fraser*, 3 Q.L.J., 180. An action having been instituted and a consent order made for a change of solicitors, the new solicitors applied to inspect documents in the hands of the former solicitors, who refused on the ground that they had a lien on these documents for an unpaid bill of costs. *Held*, that the new solicitors, on behalf of the defendant, were entitled to the inspection asked; *Re Marsland and Marsland*, 3 Q.L.J., 181. In an action by solicitors to recover costs, the defendant is not entitled to inspection of the plaintiff's draft bill of costs, as such draft bill is irrelevant, as being in the nature of a soliloquy or consultation of a man with his own mind, and therefore privileged, and is not admissible as a previous statement in writing inconsistent with the present claim of the plaintiffs: *Macdonald Paterson and Hawthorn v. Perkins*, 9 Q.L.J. (N.C.), 18. Where a party refuses to grant inspection of a document referred to in his pleadings the affidavit in answer should state positively not only that the document relates solely to his case, and does not tend to prove the opponent's case, but also that it contains nothing tending, or which might tend to impeach his own case; *Aitken v. Eltershank*, 7 A.L.T., 21 (1885).

In an affidavit of discovery the managing trustee of the Savings Bank disclosed certain minutes of the Board, but said they related solely to the defendant's case and not to the plaintiff's case, and did not in any way tend to support the plaintiff's case, and did not contain anything impeaching or cutting down the defendant's case. *Held*, that they were privileged from inspection; *Palmer v. Trustees of the Savings Bank of New South Wales*, 17 W.N. (N.S.W.), 157.

An application by the plaintiff for an order for inspection of reports furnished to the defendants by their officials in connection with an accident in respect of which the plaintiff was suing the defendants, was refused on the ground that the reports made were alleged to have been made confidentially and with a view to apprehended litigation; *Williams v. The Railway Commissioners of New South Wales*, 19 W.N. (N.S.W.), 300.

Where, in obedience to an order for discovery the defendant produced certain books, parts of which were sealed up, but it was sworn that the parts unsealed were the only parts relating to the matters in dispute in the action; *Held*, plaintiff not entitled to inspect sealed entries; *Turner v. Attenborough*, 17 A.L.T., 186.

PLACE.—An application for inspection in Sydney of books in almost daily use by a company at Bourke, was refused; *Johnston v. Bourke Meat Preserving Co.*, 13 W.N. (N.S.W.), 115. As to inspection by the defendants of the plaintiff's books in Melbourne in an action in New South Wales, see *Broken Hill Smelting Co. v. Foreman*, 12 W.N. (N.S.W.), 169.

Special order.
Cf., E. Or. 31.
r. 19A (3).

15. The Court or a Justice may, at any time, on the application of any party to a cause, and whether an affidavit of documents has or has not already been ordered or made, make an order requiring any

other party to the cause to state upon affidavit whether any specific document to be specified in the application is or has at any time been in his possession or power ; and, if it has been, but is not then, in his possession, when he parted with it, and what has become of it.

Such application shall be made on an affidavit stating that, in the belief of the deponent, the party against whom the application is made has, or has at some time had, in his possession or power the document specified in the application, and that it relates to matters in question in the cause.

As to affidavit of documents, see r. 10, *supra*.

16. When inspection of any business books is applied for, the Court or a Justice may, if they think fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries. Every such affidavit shall state whether or not there are in the original book any and what erasures, interlineations, or alterations: Provided, that, notwithstanding that such a copy has been supplied, the Court or a Justice may order inspection of the book from which the copy was made.

Verified copies.
Cf., E. Or. 31,
r. 19A (1).

17. When, on an application for an order for inspection, objection is made to the production of any documents, either on the ground of privilege or on any other ground, the Court or a Justice may inspect the document for the purpose of deciding as to the validity of the objection.

Privilege.
Cf., E. Or. 31,
r. 19A (2).

As to privilege, see notes to rr. 11, 14, *supra*.

18. If a party from whom discovery of any kind or inspection is sought objects to the discovery or inspection, or any part thereof the Court or a Justice may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause, or that for any reason it is desirable that any issue or question in dispute in the cause should be determined before deciding upon the right to the discovery or inspection, order that the issue or question shall be first determined, and may reserve the question as to the discovery or inspection.

Premature
discovery.
E. Or. 31, r. 20,

As to order for inspection, see r. 14, *supra*.

19. If any party fails to comply with an order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as

Non-compliance
with order for
discovery.
Cf., E. Or. 31,
r. 21.

if he had not defended, and the party interrogating or seeking discovery may apply to the Court or a Justice for an order to that effect, and an order may be made accordingly.

Compare H.C.P. Act, sec. 17.

As to order to answer interrogatories, see r. 7; as to attachment generally, see Or. 35.

Service on
solicitor of order
for discovery.
E. Or. 31, r. 22.

20. Service on the solicitor of a party against whom an order for interrogatories or discovery or inspection is made shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order.

As to neglect by solicitor to give notice to his client, see r. 21, *infra*.

Attachment of
solicitor.
E. Or. 31, r. 23.

21. A solicitor upon whom an order against any party for interrogatories or discovery or inspection is served under the last preceding Rule, and who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment.

As to attachment generally, see Or. 35.

Using answers to
interrogatories
at trial.
Ct., E. Or. 31,
r. 24.

22. Any party may, at the trial of a cause, or any issue in a cause, use in evidence any answer, or any part of an answer, of the opposite party to any interrogatory without putting in the whole of the answer, or the answers to other interrogatories: Provided that in any case the Justice may look at the whole of the answers, and if he is of opinion that any other answer or part of an answer is so connected with the answer put in that the last-mentioned answer ought not to be used without the other, he may direct such other answer or part of an answer to be put in by the party tendering the answer.

Where an interrogatory asked whether certain things had not been done in one of two ways stated, "or how otherwise," and the answer was given that they were done partly in each of the two ways stated and partly in other ways set out, the Court permitted the interrogatory and answer to be read in evidence, omitting from the latter the statements in answer to the question "or how otherwise," but admitted them as an admission only that they were partly done in each of the two ways stated; *Nott v. Daris*, 19 V.L.R., 485.

Discovery
against Marshal.
Ct., E. Or. 31,
r. 28.

23. In an action by or against the Marshal in respect of any matters connected with the execution of his office, the Court or a Justice may, on the application of either party, order that the affidavit to be made in answer either to interrogatories or to an order for discovery shall be made by the officer actually concerned.

As to the powers and duties of the Marshal and his officers, see *Jud. Act*, sec. 53; Or. 44; as to actions by and against the Marshal, see H.C.P. Act, sec. 31.

24. This Order shall apply to infant plaintiffs and defendants, and to their next friends and guardians *ad litem*.

Order to apply to infants.

E. Or. 31, r. 29.

As to infant plaintiffs and defendants, see Or. 2, r. 12.

ORDER XXVII.

ADMISSIONS.

1. Any party to a cause may give notice, by his pleading or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

Notice of admission of facts.

E. Or. 32, r. 1.

As to facts alleged in pleading being taken as admitted if not denied, see Or. 14, r. 10; as to costs where neglect to make proper admissions in statement of defence, see Or. 17, r. 8.

2. Any party to a cause may, by notice in writing, call upon any other party to admit any specific fact, or any document, saving all just exceptions; and, in case of refusal or neglect to admit after such notice, the costs of proving the fact or document shall be paid by the party so neglecting or refusing whatever the result of the cause may be, unless at the trial or hearing the Court or Justice certifies that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice is given unless the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

Notice to admit facts or documents.

Costs of refusal or neglect to admit.

Ct., E. Or. 32, rr. 2, 4.

Provided that any admission made in pursuance of such notice shall be deemed to be made only for the purposes of the particular cause or issue, and shall not be used as an admission against the party on any other occasion, or in favour of any person other than the party giving the notice: Provided also, that the Court or a Justice may at any time allow any party to amend or withdraw any admission so made on such terms as are just.

As to notice to produce documents, see Or. 26, r. 12.

3. When admissions of fact have been made in a cause, either on the pleadings or otherwise, any party may, at any stage of the cause, apply to the Court or a Justice for such judgment or order as upon the admissions he is entitled to, without waiting for the determination of any other question between the parties; and the Court or a Justice may, upon such application, make such order, or give such judgment, as is just.

Judgment or order upon admissions of facts.

Ct., E. Or. 32, r. 6.

As to judgment in default of pleading, see Or. 23; as to failure to deliver reply or plead to subsequent pleading being deemed an admission of the facts contained in pleading last delivered, see Or. 23, r. 9.

In an application under this rule for judgment upon admissions contained in the pleadings, the Judge will not make an order where a difficult question of law is raised ; *Greig v. Hutchinson*, 15 V.L.R., 706.

The fee payable on hearing a motion for judgment is 10s. ; on filing any pleading or other document, 2s. 6d. ; Rule of Court, October 6th, 1903.

The fee payable on drawing up and entering judgment is 10s. ; Rule of Court, October 6th, 1903.

ORDER XXVIII.

ISSUES, INQUIRIES, AND ACCOUNTS.

Issues may be prepared and settled.

E. Or. 33, r. 1.

1. When in any cause it appears to the Court or a Justice that the issues of fact in dispute are not sufficiently defined, the parties may be directed to prepare issues, and the issues shall, if the parties differ, be settled by the Court or a Justice.

As to trial of issues of fact without pleading, see Or. 13, Or. 29, rr. 9 *et seq.*

Inquiries and accounts when directed.

E. Or. 33, r. 2.

2. The Court or Justice may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

Accounts of property in New South Wales taken before the Supreme Court of New South Wales were adopted by the Supreme Court of Victoria ; *Parker v. Adams*, 3 A.L.R., 3.

The fee payable on drawing up and entering judgment is 10s. ; Rule of Court, October 6th, 1903.

ORDER XXIX.

QUESTIONS OF LAW AND ISSUES WITHOUT PLEADINGS.

1. Questions of Law.

Special case by consent.

E. Or. 34, r. 1.

1. The parties to any cause may concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of the case the Court and the parties shall be at liberty to refer to the whole contents of any documents referred to therein, and the Court shall be at liberty to draw from the facts and documents stated in the case any inference, whether of fact or law, which might have been drawn therefrom if they had been proved at a trial.

Points of law may be raised by the pleadings ; Or. 14, r. 26 ; or on demurrer ; Or. 21. In the disposal under Or. 25 (Vic.) of a point of law raised by a pleading, all the facts alleged in the pleading must be accepted as true, and it must be assumed on all other points the pleading is unassailable ; *Niven v. Grant*, 25 A.L.T., 18.

2. If in any cause it is made to appear to the Court or a Justice that there is any question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, the Court or Justice may make an order accordingly, and may direct the question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or Justice deems expedient ; and all such further proceedings as the decision of the question of law renders unnecessary may thereupon be stayed.

Special case by order before trial.
E. Or. 34, r. 7.

Questions of law ordered to be decided before trial of question of fact ; *Mills v. Day Dawn Block G.M. Co. Ltd.*, 1 Q.L.J., 98. Where questions of law are raised upon the pleadings, a Judge may, before trial of the issues of fact, order that the questions of law be referred to the Full Court ; *Lane v. Casey*, 12 V.L.R., 380.

3. Every special case shall be signed by the several parties or their solicitors, and shall be filed by the plaintiff.

Special case to be filed.
Ct., E. Or. 34, r. 3.

The fee payable on filing a special case is £1 ; Rule of Court, October 6th, 1903.

4. A special case in any cause to which a married woman, not being a party thereto in respect only of her separate property or in respect only of any separate right of action by or against her, or an infant, or a person of unsound mind who has not been so found or declared, or for whom a committee of the person or estate, as the case may be, has not been appointed, is a party, shall not be set down for argument without leave of the Court or a Justice, the application for which must be supported by sufficient evidence on oath that the statements contained in the special case, so far as the same affect the interest of the married woman, infant, or person of unsound mind, are true.

Leave to set down where married woman, infant, or person of unsound mind is a party.
Ct., E. Or. 34, r. 4.

As to entry of case for argument, see r. 6, *infra*.

5. The parties to a special case may sign a memorandum to the effect that, on the judgment of the Court being given in the affirmative or negative of any question of law raised by the case, a sum of money, fixed by the parties, or to be ascertained by the Court, or in such manner as the Court directs, shall be paid by one of the parties to the other of them, either with or without the costs of the cause ; and the judgment of the Court may be entered for the sum so agreed or ascertained, with or without costs, and execution may issue upon such

Agreement as to payment of money and costs.
Ct., E. Or. 34, r. 6.

judgment forthwith, unless otherwise agreed, or unless stayed on appeal.

As to ascertainment of damages when a matter of calculation, see Or. 30, r. 27, 28.

As to fee payable on entering judgment, see Rule of Court, October 6th, 1903; *sub-tit.* "Drawing up and entering judgments."

Form of entry
for argument.
Cf., E. Or. 34,
r. 5.

6. Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, and, if any married woman, not being a party in respect only of such matters as in Rule 4 of this Order are specified, or if an infant, or any such person of unsound mind as mentioned in that Rule, is a party to the cause, producing a copy of the order giving leave to enter the special case for argument.

Special case may
be heard before
Full Court in
the first
instance.
Cf., Q. Or. 38,
r. 7.

7. When the party entering a special case for argument enters it to be heard before a single Justice, and any other party desires it to be heard before a Full Court in the first instance, he may, within four days after receiving notice that the case has been so entered, deliver to the Registrar and to the opposite party a memorandum to that effect, and the special case shall thereupon be deemed to have been entered to be heard before a Full Court in the first instance.

If the action is pending in a District Registry, the special case shall be forthwith transmitted to the Principal Registry, unless a sitting of a Full Court is appointed to be held within sixty days at the place where the District Registry is situated. After the decision of the Full Court the special case shall be returned to the District Registry with a certificate of the judgment or order of the Full Court.

The fee payable on filing a special case is £1; Rule of Court, October 6th, 1903.

Copies for
Justices.
Cf., E. Or. 34,
r. 3.

8. Four days at least before the day for which a special case is set down for argument the party setting it down shall leave a copy of the case at the Chambers of the Justice, or at the Chambers of each of the Justices who are to sit on the hearing of the argument.

As to computation of the time limited by this rule, see Or. 45.

2. *Issues of Fact without Pleadings.*

Trial of question
of fact agreed
upon.
Cf., E. Or. 34,
r. 9.

9. If the parties to a cause agree as to any questions of fact to be decided between them, they may, at any time before judgment, by consent and by order of the Court or a Justice, proceed to the trial of those questions of fact without formal pleadings. Such questions may be entered for trial and tried in the same manner as issues joined upon

pleadings in an action, and the proceedings thereon shall be subject to the same control by the Court or a Justice as when issue is joined upon pleadings.

As to trial of actions without pleadings, see Or. 13.

10. The Court or a Justice may by consent of the parties order that, upon the finding in the affirmative or negative of any such question as in the last preceding Rule mentioned, a sum of money, fixed by the parties, or to be ascertained upon a question stated for that purpose, shall be paid by one of the parties to the other of them, either with or without the costs of the cause.

Order for payment of sum of money.
E. Or. 34, r. 10.

As to ascertainment of damages when a matter of calculation, see Or. 30, rr. 27, 28.

11. Upon the finding on any such question as in the last two preceding Rules mentioned, judgment may be entered for any sum so agreed or ascertained, or for any other relief to which the finding shows either party to be entitled, with or without costs, as the case may be, and execution may issue upon the judgment forthwith, unless otherwise agreed, or unless the Court or a Justice otherwise orders for the purpose of giving either party an opportunity of moving to set aside the finding or for a new trial.

Entry of judgment upon the finding.
Cf., E. Or. 34, r. 11.

12. The proceedings upon any such issue as aforesaid may be recorded at the instance of either party, and the judgment, whether actually recorded or not, shall have the same effect as any other judgment in a contested action.

Record of proceedings.
Cf., E. Or. 34, r. 12.

ORDER XXX.

TRIAL.

1. Place.

1. The plaintiff may in the indorsement on his writ or in his statement of claim name the place where he purposes that the action shall be tried, which place shall be within the State in which the cause of action arose, and the action shall, unless the Court or a Justice otherwise orders, be tried in the place so named. When no place of trial is named, the place of trial shall, unless the Court or a Justice otherwise orders, be the place in which the Registry from which the writ was issued is situated.

Place of trial.
Cf., E. Or. 36, r. 1.

The provisions of this Order, so far as the same relate to the place and mode of trial, are subject to such modification or variation as the Court or a Judge may think fit to make on a summons for directions under Or. 12. As to venue in suits for penalties, taxes and forfeitures, see *Jur. Act*, sec. 82, *et seq.*; as to change of

venue, see H.C.P. Act, sec. 25, and notes thereto; as to appointing places of trial for different issues, see r. 4, *infra*; as to applications as to place of trial in summons for directions, see Or. 12, r. 2; as to places where appeals are heard, see Rules of Court, October 12th, 1903.

CAUSE OF ACTION.—A cause of action includes every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action; *Read v. Brown*, 22 Q.B.D., 128. In an action to recover the price of goods sold and delivered, non-payment of the price is part of the cause of action; *Nortley Stone Co. v. Gidney*, (1894) 1 Q.B. 99. The incorporation of a defendant company is part of the cause of action; *Bowler v. Barberton Development Syndicate* (1897), 1 Q.B., 164. The cause of action does not comprise every piece of evidence which is necessary to present to prove it, but every fact which is necessary to be proved, each one of those facts being a part of the cause of action. Thus in an action on a contract the making of a contract as well as its breach are each a part of the cause of action; *Jackson v. Spittall*, L.R., 5 C.P., 542. Hence if the contract is made outside the territorial limits of a Court, but the breach occurs within them, a material part of the cause of action arises within the jurisdiction; *Durham v. Spence*, L.R., 6 Ex., 46. "Cause of action" has been held to mean not the whole cause of action but "the act of the defendant which gave the plaintiff his cause of complaint"; *Jackson v. Spittall*, L.R.C.P., 542; *Vaughan v. Weldon*, L.R., 10 C.P., 57.

A contract is made at the place where the offer or proposal is accepted, and not at the place from which it is sent; *Cowan v. O'Connor*, 20 Q.B.D., 640. The acceptance of an offer or proposal is a material part of a cause of action; *Bullen v. Hooper*, 2 V.R. (L.), 108. Where an offer or an order is made outside the jurisdiction, and is accepted or obeyed within it, it has been held that the whole cause of action arises within the jurisdiction; *Cowan v. O'Connor*, 20 Q.B.D., 640; *Newcombe v. De Roos*, 29 L.J.Q.B., 4; *Aris v. Orchard*, 30 L.J., Ex., 21; *Rennix v. Ratcliffe*, 35 L.T., 833. In an action for goods sold and delivered the material part of a cause of action arises where the order is accepted; *Borthwick v. Walton*, 24 L.J.C.P., 83.

Under the *County Court Act 1890* (Vic.), jurisdiction is given if it appears that the cause of action arose either wholly or in some material point within a certain area. The following Victorian decisions have been given on this Statute. In a case where the defendant in Melbourne wrote to the plaintiff at Stuttgart in Germany requesting that some goods might be sent out to him, and stating that, if they answered expectations, he would give a large order, and some goods were accordingly forwarded by the plaintiff to the defendant, through a carrier at Rotterdam, accompanied by a bill of lading in favour of the defendant, and the goods arrived, and the defendant paid part of the purchase money, but declined to pay the balance for which he was sued in the County Court, it was held that the cause of action arose out of Victoria, inasmuch as the delivery to the carrier at Rotterdam was a delivery to defendant, and, consequently, that the contract was made in Germany; *Chapman v. Scheidmayer*, 1 A.J.R., 115. Where a carrier is the agent for the defendant to receive and carry goods, a material part of the cause of action arises at the place where the goods are delivered to the carrier; *Flower v. Jackson*, 1 W. & W. (L.), 42.

In an action on a judgment recovered in New South Wales, though the defendant resided in Melbourne, it was held that the County Court had no jurisdiction, as the cause of action did not accrue within the colony; *Greville v. Smith*, Ker. & Box, 370. Goods were offered by plaintiff residing in Victoria by letter to defendant residing in New Zealand. The offer was accepted by letter, giving instructions generally to forward. Held, that the plaintiff was defendant's agent to select the ship, and consequently the delivery being in Victoria the County Court had jurisdiction; *Green v. Lewis*, 4 V.L.R. (L.), 197. Where property was wrongfully taken possession of in Victoria and afterwards shipped to India, and there sold by the agent of the wrongdoer, it was held that a conversion took place in Victoria, and that the County Court had jurisdiction; *Powell v. Gidney*, 5 V.L.R. (L.), 20.

Where a contract was made and broken outside the territorial limits of the County Court it was held that it had no jurisdiction though the defendant resided within such limits; *Crooke v. Smith*, 4 V.L.R. (L.), 95, followed in *Brooks, Robinson & Co. v. Howard Smith & Sons*, 16 V.L.R., 245. In *Maschewitz v. Searles* (1903) S.R. (Q.), 238; *Thompson v. Hood*, 5 N.S.W.L.R. (L.), 202, it was held a District Court had jurisdiction to hear a case arising out of a breach of contract although the contract was entered into beyond the territorial jurisdiction of the State if the breach occurred and the defendant resided within the State. In *Helwitz v. Friez Bros.*, 8 A.L.R. (C.N.), 33, the facts were that the plaintiff at the request of defendants gave Hugo Wertheim & Co. an order to procure for the defendants an embroidery machine which could be obtained only from Germany; that plaintiff became personally responsible to Wertheim & Co. in consideration of the defendants promising to pay him the purchase money and expenses connected with the landing and delivery of the machine in Melbourne; that Wertheim & Co. purchased the machine in Germany and delivered it to the defendants in Melbourne; that Wertheim & Co. debited the purchase money and the expenses to the plaintiff and looked solely to him for payment; that when the plaintiff asked one of the defendants to fulfil his promise the latter said he had arranged matters with Wertheim. It was held by Judge Chomley that the contract was made in Melbourne, and the breach of it complained of was committed in Melbourne.

CHANGE OF VENUE.—See cases noted under H.C.P. Act, sec. 25, p. 230. The following decisions have recently been given. Change of venue to place where cause of action arose was ordered in *Kiehne v. Sullivan*, 20 W.N. (N.S.W.), 34; *The A. J. S. Bank Ltd. v. Hockey*, 20 W.N. (N.S.W.), 32; *Permevan, Wright & Co. Ltd. v. Pearce*, 20 W.N. (N.S.W.), 202. An application for change of venue by the defendant was refused on the ground that it was not made *bond fide*. There is no general rule that in applications for change of venue the nature of the evidence to be given by the applicant's witnesses must be stated in every case; *The Australian Sheep Dip Co. v. Kramer*, 20 W.N. (N.S.W.), 234. Parties making statements in affidavits upon these applications with regard to increased fee to counsel and the impossibility of obtaining a fair trial will render themselves liable to costs; *Kiehne v. Sullivan*, 20 W.N. (N.S.W.) 34. Where a Judge in Chambers in the exercise of his discretion makes an order to change the venue, the Court will not interfere unless they are satisfied that the Judge has acted on a wrong principle; *Budge v. Britten*, 20 W.N. (N.S.W.), 87.

2. Mode of Trial.

Trial by jury.
Ct., E. Or. 36,
r. 2.

2. Any party to a suit may within ten days after notice of trial has been given, or within such extended time as the Court or a Justice allows, apply to the Court or a Justice for a trial with a jury of the suit or of any issues of fact, and the Court or Justice may if they think fit direct a trial with a jury of the suit or issues accordingly, and thereupon they shall be so tried, and the notice of trial shall stand for the next appointed Sittings of the Court at the place of trial, not being earlier than the day for which the notice was given.

As to trial being by Justice without jury unless ordered, see H.C.P. Act, sec. 12; as to power of Court to direct trial with a jury of the suit or any issue of fact, *ib.*, sec. 13; as to power of Court to direct trial with jury at any time, see r. 3 *infra*; as to questions of fact being tried differently or one before the other, see r. 4, *infra*; as to trial with a jury being held before a single Justice unless otherwise ordered, see r. 5, *infra*; as to giving notice of trial, see r. 6, *et seq.*, *infra*; as to early trial of cause, see Or. 37, r. 8; as to computation of time limited by this rule, see Or. 45.

Court may
direct trial with
jury at any
time.
Ct., E. Or. 36,
r. 6.

3. If in any cause or matter set down for trial before a Justice without a jury it appears to the Court or a Justice either before or at the trial that any issue of fact could be more conveniently tried before a Justice with a jury, the Court or Justice may direct that it shall be so tried, and may for that purpose vary any previous order.

In *Bank of Australasia v. Gilbert*, 9 Q.L.J. (N.C.), 117, an order was made extending the time for giving notice by the defendant under the Queensland rules that he desired to have the issues of fact tried by a jury.

Where an action has been set down for trial before a Judge an application that the action should be tried before a Judge with a jury will not be granted if it appears that delay and expense had been caused by taking the case out of its position in the list; *Goldsbrough, Mort & Co. v. Griffiths & Co.*, 14 A.L.T., 125.

Questions of fact
may be tried
differently, or
one before the
other.
Ct., E. Or. 36,
r. 5.

4. Subject to the provisions of the preceding Rules of this Order, the Court or a Justice may, in any cause or matter, at any time or from time to time, order that different questions or issues of fact arising therein shall be tried by different modes of trial, or that some questions or issues of fact shall be tried before others, and may appoint the places for such trials, and may for that purpose vary any previous order.

As to power of Court or Justice to order early trial of causes, see Or. 37, r. 8.

Trial to be
before single
Justice specially
ordered.
E. Or. 36, r. 9.

5. Every trial of a question or issue of fact with a jury shall be held before a single Justice, unless it is specially ordered to be held before two or more Justices.

As to jurisdiction of the High Court being exercised by a single Justice, see *Jud. Act*, sec. 15.

3. Notice and Entry of Trial.

6. Notice of trial may be given with a joinder of issue closing the pleadings or with the reply, or at any time after the issues of fact are ready for trial, or, if there are no pleadings, at any time after the expiration of ten days from appearance.

Notice of trial by plaintiff.
Cf., E. Or. 36, r. 11.

As to notice of trial where jury directed, see r. 2, *supra*; as to notice of trial ceasing to have effect if entry for trial out of time, see r. 11, *infra*; as to countermanding notice of trial, see r. 13, *infra*; as to trial of action without pleadings, see Or. 13; as to joinder of issue closing pleading, see Or. 19; as to trial of issues of fact without pleadings, see Or. 29, r. 9, *et seq.*; as to computation of the time limited by this rule, see Or. 45.

7. If the plaintiff does not give notice of trial within three months after he is first entitled to do so, or within the like period after a new trial is ordered, or, in either case, within such extended time as the Court or a Justice allows, any defendant may, before notice of trial given by the plaintiff, give notice of trial, or apply to the Court or a Justice to dismiss the action for want of prosecution; and on the hearing of such application the Court or a Justice may order the action to be dismissed accordingly, or may make such other order, and on such terms as are just.

Notice of trial by defendant.
Motion to dismiss for want of prosecution.
Cf., E. Or. 36, r. 12.

As to dismissal of action for want of prosecution in default of pleading, see Or. 23, r. 1; as to computation of time limited by this rule, see Or. 45.

8. The notice of trial shall state whether it is for the trial of the cause or of questions or issues therein, and shall name the place where, and the day on which, the trial is to be had.

Form of notice of trial.
Cf., E. Or. 36, r. 13.

Notice for trial may, by leave of the Court, be given for a day later than the first day of the sittings; *Winter v. Bell*, (1902) Q.W.N., 58 (Griffith, C.J.) See also r. 12, *infra*.

9. Sixteen days' notice of trial shall be given, unless the party to whom it is given has consented, or is under terms, to take shorter notice of trial; and such notice shall be sufficient in all cases, unless otherwise ordered by the Court or a Justice.

Length of notice.
Cf., E. Or. 36, r. 14.

This rule applies to an inquiry pursuant to a writ of inquiry, see r. 26, *infra*; as to early trial, see Or. 37, r. 8; as to computation of time limited by this rule, see Or. 45.

Where an action was placed on the list for trial on a day prior to the expiration of the 21 days' notice of trial necessary under Victorian rules, and it came on for hearing on that day in the absence of the plaintiff, and the defendant claimed and obtained judgment, such judgment was set aside, and as he was warned by the Judge that the time had not expired, and that he took it at his own risk, it was set aside with costs. *The Old Welshman's Reef G. M. Co. v. The Welshman's Reef G. M. Co.*, 14 V.L.R., 323.

Entry of cause for trial.
Ct., E. Or. 36, r. 15.

10. Notice of trial shall be given before entering the cause or questions or issues for trial ; and a cause may be entered for trial, notwithstanding that the pleadings are not closed, provided that notice of trial has been given.

This rule applies to an inquiry pursuant to a writ of inquiry, see r. 26, *infra* ; as to time for entry for trial, see r. 11 ; as to entry of trial by party served with notice of trial, see r. 14, *infra* ; as to copies of pleadings, &c., to be delivered for use of Justice at trial when entering cause for trial, see r. 15, *infra* ; as to when pleadings are closed ; Or. 19, r. 4 ; Or. 23, r. 9. The fee on entering an action for trial before a Justice with or without a jury, in addition to the fees, if any, payable in respect of a jury, is £1 ; Rule of Court, October 6th, 1903.

Substituted service on a defendant of the originating proceeding in an action was ordered to be made by advertisement in certain newspapers, and sixteen days were allowed for entering an appearance. The defendant did not enter an appearance, and, on the case coming on for hearing, evidence by affidavit was tendered to prove compliance with the order for substituted service. *Held*, that proof of the fact should not be given at the trial. The Registrar should satisfy himself that all necessary services have been effected before allowing any case to be set down for trial ; *Allen v. Allen*, (1902) 2 Q.W.N., 92 (Griffith, C.J.)

Avoidance of notice of trial.
Ct., E. Or. 36, r. 16.

11. The entry must be made within six days after notice of trial is given ; otherwise the notice of trial shall cease to have effect.

As to entry of cause for trial, see r. 10 ; as to the computation of the time limited by the rule, see Or. 45.

Notice of trial.
Ct., E. Or. 36, rr. 17, 18, 18A.

12. Notice of trial of a cause or questions or issues before a Justice with a jury shall be for the first day of the Sittings, unless the Court or a Justice allows it to be given for a later day.

As to trial by jury, see r. 2, *supra*.

Countermanding notice.
Ct., E. Or. 36, r. 19.

13. A notice of trial shall not be countermanded except by consent, or by leave of the Court or a Justice, which leave may be given subject to such terms as to costs, or otherwise, as are just.

This rule applies to an inquiry pursuant to a writ of inquiry ; see r. 26, *infra*.

When once a case gets duly in the list of causes for trial it cannot get out of the list except—(1) By being tried and disposed of ; (2) By the parties consenting to its being withdrawn ; or (3) By the Judge striking it out or ordering it to be withdrawn, but the trial may by order of the Judge but not otherwise be from time to time postponed ; *Crotty v. Clarke*, 22 V.L.R., 594.

Entry for trial by party served with notice.
Ct., E. Or. 36, r. 20.

14. If the party giving notice of trial omits to enter the cause or issues for trial on the day of or the day after giving notice of trial, the party to whom notice has been given may, within eight days thereafter, enter the same for trial, unless in the meantime the notice has been countermanded under the last preceding Rule.

As to entry of action for trial, see r. 10, *supra*; as to computation of the time limited by this rule, see Or. 45.

4. Papers for Justice.

15. The party entering the cause or questions or issues for trial shall deliver to the proper officer two copies of the whole of the pleadings, if any, and of the issues, or of such other proceedings as show the questions for trial, one of which shall be for the use of the Justice at the trial.

Copies of pleadings, &c., to be delivered.
Cf., E. Or. 36, r. 30.

As to entry of cause for trial, see r. 10, *supra*. In Queensland the practice is for the officer receiving the pleadings to cause a copy to be delivered to the Associate of the Judge taking the sittings; *Wilson and Graham, The Supreme Court Practice*, p. 168.

5. Proceedings at Trial.

16. If, when a cause is called on for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him.

Default of appearance by defendant at trial.
Cf., E. Or. 36, r. 31.

As to motion for judgment, see Or. 33. Defendants appearing unconditionally at the trial, and taking the usual part of the defendants thereat, waive any objection to the jurisdiction, although they may have pleaded it by their defence; *Peyton, Dowling & Co. v. Houlder Bros.*, 16 V.L.R., 812.

17. If, when a cause is called on for trial, the defendant appears, and the plaintiff does not appear, the defendant shall be entitled to judgment dismissing the action.

Default of appearance by plaintiff.
Cf., E. Or. 36, r. 32.

As to motion for judgment, see Or. 33.

18. A verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a Justice upon such terms as are just. If the cause was set down for trial in a place where there is no District Registry, the application may be made either at the place appointed for the trial before the close of the Sittings, or afterwards at the place where the District Registry is situated.

Judgment by default may be set aside on terms.
Cf., E. Or. 36, r. 33.

As to setting aside judgment obtained by default, see also Or. 10, r. 8; Or. 23, r. 11.

Compare the following cases as to the practice in New South Wales.

Where a cause was removed from the Jury Court to the Banco Court and was called in on the Banco Court the same day, and a verdict was taken for the plaintiff in the absence of the defendant, a new trial was granted; *City Bank v. Kelly*, 2 S.C.R. (N.S.) N.S.W., 46. A verdict was obtained by the plaintiff in the absence of the defendant and his counsel and attorney, the case coming on unexpectedly in consequence of two prior cases on the list being settled. On a

motion for a new trial on terms, the defendants agreeing to pay the costs of the day, it was held that the motion must be refused, their being no affidavit of merit; *Weitzel v. Friedenreich*, 14 W.N. (N.S.W.), 7.

Adjournment of trial.
Of. E. Or. 36, r. 34.

19. A Justice may, at or before the trial, if he thinks it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms, if any, as he thinks fit.

This rule applies to an inquiry pursuant to a writ of inquiry; see r. 26, *infra*. As to change of venue, see notes to sec. 25 H.C.P. Act, *supra*, p. 230; r. 1, *supra*.

The fact of the defendant being in gaol is not a sufficient ground for postponement; *Fowler v. Keena*, 1 W.N. (N.S.W.), 129. When a plaintiff who intended to appear was absent when the case was called on owing to it being called on unexpectedly, an adjournment was allowed on terms; *Lucas v. Meagher*, 13 W.N. (N.S.W.), 67. As to costs, see note to Or. 46, r. 1.

Nonsuit.
Q. Or. 39, r. 35.

20. When the plaintiff at the trial fails to establish by his evidence such a case as to call for an answer from the defendant, the Court may direct judgment of nonsuit to be entered.

As to effect of judgment of nonsuit, see r. 21, *infra*; as to withdrawing juror, see Or. 38, r. 4.

A defendant is not entitled, at the close of the plaintiff's case, to ask for a verdict without stating that he intends to call no evidence; *The New Zealand L. and M. A. Co. Ltd. v. Smith*, 15 A.L.T., 92.

Counsel cannot refuse to be nonsuited when the matter is one of pure law; but when the matter consists of a question or mixed law and fact, counsel can insist upon it going to the jury. The rule as to nonsuit is not changed by the fact that the Judge is discharging the functions of judge and jury; *Kennedy v. Neill*, 1 Q.L.J., 65. Where an action is brought by an agent under a power of attorney and without instructions the Judge is not bound to non-suit; *Bullen v. Tully*, 2 S.C.R. (Q.), 133.

In New South Wales the following decisions have been given with respect to nonsuit. A plaintiff who elects to be nonsuited in consequence of the ruling of the Judge upon a point of law is not estopped from afterwards moving to set the nonsuit aside; *Rolfe v. Lea*, 16 N.S.W.L.R., 163. See also *Douling v. Farrell*, (1903) S.R. (N.S.W.), 42. Plaintiff's counsel having admitted that he could not succeed on the declaration as it stood, applied for an amendment, which was refused after argument, and the plaintiff was nonsuited. It was held that the plaintiff could not, after argument, refuse to be nonsuited; *Dashborough v. Perpetual Trustees Co.*, 13 W.N. (N.S.W.), 92. Although the Judge nonsuits the plaintiff on one count at the commencement of the case, that is only an expression of intention. The decision is not given until the end of the case; *Siebert v. Miller*, 12 W.N. (N.S.W.), 87. Where a nonsuit is moved for and refused, and leave is reserved to the defendant to move the Court to enter a nonsuit, if the defendant goes into evidence, the Court, in determining whether a nonsuit should be entered, can consider the defendant's evidence; *Ostermeyer v. Harrold*, 12 W.N. (N.S.W.), 38. A nonsuit may properly be granted notwithstanding there may

have been some evidence to go to the jury, if it was of such a nature that the jury could not reasonably give a verdict in favour of the plaintiff; *Hiddle v. National Fire Co.*, 17 N.S.W.L.R., 46 (Privy Council).

Under the Judicature Rules there cannot be a judgment by way of nonsuit; the proper course is to order judgment for the defendants; *Fox v. Star Newspaper Co.*, (1898) 1 Q.B., 636; (1900) A.C., 19, applied; *Rees v. Duncan*, 25 V.L.R., 520.

21. A judgment of nonsuit shall not have the effect of a judgment on the merits for the defendants.

Effect of judgment of nonsuit.

22. The Justice may, at or after a trial, direct that judgment be entered for any or either party, or may adjourn the case for further consideration, or may leave any party to move for judgment.

Q. Or. 39, r. 36. Judgment. Further consideration. Cf., E. Or. 36, r. 39.

As to motion for judgment, see Or. 33. The fee on filing a written request to set down the cause or matter for further consideration is 5s.; on hearing any cause or matter set down for further consideration it is 10s.

A trial within the meaning of Or. 36, r. 29 (Vic.), is not finished until the Judge has delivered his decision. Hence, where a case is tried by a judge without a jury, and, at the close of the case, he reserves his judgment, he may, in delivering that reserved judgment, make any reservation for the consideration of the Full Court, or give any direction authorized by Or. 36, r. 39 (Vic.), to be given at the trial; *Killyer v. Roberts*, 28 V.L.R., 155.

23. At every trial, when the officer present at the trial is not the officer by whom judgment ought to be entered, the associate shall enter all such findings of fact as the Justice directs to be entered, and the directions, if any, of the Justice as to judgment, and the certificates, if any, granted by the Justice, in a book to be kept for the purpose.

Entry of findings of fact on trial at Assizes, &c. Cf., E. Or. 36, r. 41.

24. If the Justice directs that any judgment be entered for any party absolutely, the certificate of the associate to that effect shall be a sufficient authority to the proper officer to enter judgment accordingly.

Certificate for entry of judgment. Cf., E. Or. 36, r. 42.

6. Writs of Inquiry and References as to Damages.

25. Writs of inquiry shall be directed to such persons as the Court or a Justice directs.

Writs of inquiry.

As to what rules are applicable in case of an inquiry, see r. 26, *infra*; as to issue of writs to assess damages, see Or. 10, rr. 5, 6, 7; Or. 23, rr. 3, 4, 5.

26. The provisions of Rules 9, 10, 13, and 19 of this Order shall, with the necessary modifications, apply to an inquiry pursuant to a writ of inquiry.

Application of Rules. Cf., E. Or. 36, r. 56.

These rules deal with notice of, entry for, countermanding notice of, and adjournment of trial respectively.

27. In any cause in which it appears to the Court or a Justice that the amount of damages sought to be recovered is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry,

Ascertainment of damages when a matter of calculation. Cf., E. Or. 36, r. 57.

but the Court or a Justice may direct that the amount for which final judgment is to be entered shall be ascertained by an officer of the Court. In any such case the attendance of witnesses and the production of documents before the officer may be compelled by subpoena, and the officer may adjourn the inquiry from time to time.

The officer shall certify by indorsement upon the order by which the question is referred to him the amount of damages found by him, and shall deliver the order with the indorsement to the person entitled to the damages; and the like proceedings may thereupon be had as to entering judgment, taxation of costs, and otherwise, as upon the return to a writ of inquiry.

In Queensland the Court has, under a corresponding rule, directed an inquiry as to damages to be made before the Registrar; *Broadhurst v. Nichols*, 28th Aug., 1901; *Wilson and Graham, Supreme Court Practice*, p. 174.

Damages in respect of continuing cause of action.
Cf., E. Or. 36, r. 58.

28. When damages are to be assessed in respect of a continuing cause of action they shall be assessed down to the time of the assessment.

ORDER XXXI.

EVIDENCE.

1. Examination of Witnesses.

Request to examine witnesses.
Cf., E. Or. 37, r. 6A.

1. The Court or a Justice may, in any case in which a request to examine witnesses may by law be issued, order that a request to examine witnesses be issued in lieu of a commission.

As to the issue of requests for taking of evidence in places outside the jurisdiction of the Court, see Imperial Acts *Evidence by Commission Act 1859* (22 Vic. c. 20), and *Evidence by Commission Act 1885* (48 & 49 Vic. c. 74), (P. & W. Q., 3294-7).

The Supreme Court of Queensland decided that it would decline to act upon a commission from the High Court of Justice in England which was in a mandatory form; *In re a Commission from the Probate Division, England*, 2 Q.L.J., 137. Compare also *In re Turnbull*, 2 Q.L.J., 131; *In re Lowry*, 4 Q.L.J., 131.

Where a witness, who was a prisoner in gaol, was sought to be examined under 22 Vic. c. 20, sec. 1, under a foreign commission, an order was made directing that the examination should be held without any direction that the witness should attend; *MacDonald v. De Bauer*, 20 A.L.T., 133.

Order for attendance of person to produce documents.
E. Or. 37, r. 7.

2. The Court or a Justice may, in any cause or matter, at any stage of the proceedings order the attendance of any person before the Court or a Justice for the purpose of producing any writing or other document named in the order which the Court or Justice thinks fit to

be produced : Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial.

As to order by the High Court for production by parties of any books or writings in their possession containing evidence pertinent to issue, see H.C.P. Act, sec. 17 ; as to application for discovery of documents, see Or. 26, rr. 8, 10 ; as to production of documents for inspection, *ib.*, rr. 11 *et seq.* ; as to notice to admit documents, see Or. 27, r. 2.

There is no power to order a bank not a party to the action to produce books for the inspection of a party to the action ; *Turner v. Attenborough*, 17 A.L.T., 186,

3. Any person who wilfully disobeys an order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of court, and may be dealt with accordingly. Disobedience to order for attendance.
E. Or. 37, r. 8.

As to examination of witnesses, see H.C.P. Act, sec. 19 ; as to attendance of witness under subpoena for examination, see r. 12, *infra* ; as to application for order directing attendance of witness duly summoned who refuses to attend, see r. 5, *infra* ; as to power of Court to punish for contempt, see *Jud. Act*, sec. 24 ; as to committal for contempt, see Or. 43.

4. Any person required to attend for the purpose of being examined or of producing any document shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in Court. Expenses of person ordered to attend.
E. Or. 37, r. 9.

5. If any person duly summoned by subpoena to attend for examination refuses to attend, or if, having attended, he refuses to be sworn or to answer any lawful question, a certificate of the refusal, signed by the examiner, shall be filed in the Registry, and thereupon the party requiring the attendance of the witness may apply to the Court or a Justice, *ex parte* or on notice, for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be. Refusal of witness to attend or to be sworn.
E. Or. 37, r. 13.

As to disobedience to order for attendance, see r. 3, *supra*. The fee on filing a certificate of refusal of a witness to attend is 2s. 6d. ; Rule of Court, October 6th, 1903.

6. If any witness objects to any question which is put to him before an examiner, the question, and the objection of the witness thereto, shall be taken down by the examiner and transmitted by him to the Registry, to be there filed, and the validity of the objection shall be decided by the Court or a Justice. Objection by witness to questions.
E. Or. 37, r. 14.

As to costs occasioned by such objection, see r. 7, *infra*; the fee on an examiner filing a question to which a witness objects, together with the objection, is 2s. 6d.; Rule of Court, October 6th, 1903.

Costs occasioned
by refusal or
objection.
E. Or. 37, r. 15.

7. In any case under the two last preceding Rules, the Court or a Justice may order the witness to pay any costs occasioned by his refusal or objection.

Depositions to
be transmitted
to central office.
Ct., E. Or. 37,
r. 16.

8. When the examination of any witness before an examiner has been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the Registry, and there filed. Any party may have a copy of the depositions, or of any part thereof, on payment of the prescribed fee.

The fee prescribed for a copy of the depositions is 8d. for every folio. Rule of Court, October 6th, 1903.

Special report
by examiner.
E. Or. 37, r. 17.

9. The person taking the examination of a witness may, and if need be shall, make a special report to the Court touching the examination and the conduct or absence of any witness or other person thereon, and the Court or a Justice may thereupon direct such proceedings to be taken, and may make such order, as upon the report is just.

Depositions not
to be given in
evidence
without consent
or by leave of
Justice.
E. Or. 37, r. 18.

10. Except as by this Act otherwise provided, no deposition shall be given in evidence at the hearing or trial of a cause or matter without the consent of the party against whom it is offered, unless the Court or Justice is satisfied that the deponent is dead or beyond the jurisdiction of the Court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence, saving all just exceptions, without proof of the signature to the certificate.

Oaths.
Ct., E. Or. 37,
r. 19.

11. Any officer of the Court or other person directed to take the examination of any person may administer the necessary oaths to him.

As to form of oath, see H.C.P. Act, sec. 18.

2. Subpœnas.

Attendance of
witness under
subpœna for
examination or
to produce
documents.
Ct. E. Or. 37,
r. 20.

12. Any party to a cause or matter may, subject to these Rules, by a writ of subpœna ad testificandum or subpœna duces tecum, require the attendance of any person, or the production of any document, before the Court or Justice at the hearing or trial, or on the hearing of any motion or application in the cause or matter, or before the Registrar or other officer of the Court or other person appointed to make any inquiry in the cause or matter, or before any person appointed to take any examination of witnesses.

As to disobedience to order for attendance, see r. 3, *supra*.

The fee on sealing a writ of subpoena for not more than three persons is 5s. ; every additional person named in the subpoena 1s. Rule of Court, October 6th, 1903.

In *Boyet v. Boyett*, 2 A.L.R. (C.N.), 327, reference was made to a case heard before the Chief Justice of Victoria in which the reluctant witness who did not attend on subpoena was fetched to the Court by the sheriff's officer. In *In re Fitzgerald*, 7 Q.L.J. (N.C.), 103, where a witness failed to appear, a rule was granted by Griffith, C.J., calling on him to show cause why a writ of attachment should not issue against him for his contempt.

When the hearing of a cause in the day's list is adjourned to another day it is not necessary to re-seal the subpoena, *duces tecum*; *Mackellar v. Mackellar*, 24 V.L.R., 456.

13. When a subpoena is required for the attendance of a witness for the purpose of proceedings in Chambers, the subpoena shall issue from the Registry upon a fiat of the Justice.

Subpoena for attendance of witness in Chambers.
Ct., E. Or. 37, r. 28.

14. When a subpoena is required for the attendance of a witness for the purpose of proceedings before the Registrar or other officer of the Court, the subpoena shall be issued upon the direction of the Registrar or officer.

Subpoena for attendance before Registrar.
Q. Or. 40, r. 32.

15. The service of a subpoena shall be effected in the same manner as the service of a writ of summons in an action. The copy of a subpoena for a witness served upon him need not contain the name of any witness other than the person served.

Service of subpoena.
Ct., E. Or. 37, r. 32.

As to time within which subpoena to be served, see r. 17, *infra*; as to mode of service of a writ of summons, see Or. VII., rr. 1, 2.

16. Affidavits filed for the purpose of proving the service of a subpoena upon any person must state when, where, how, and by whom, the service was effected.

Affidavit to prove service of subpoena.
E. Or. 37, r. 33.

17. The service of a subpoena shall be of no validity unless it is made within twelve weeks after the date of issue.

Within what time subpoena to be served.
E. Or. 37, r. 34.

As to computation of time limited by this rule, see Or. 45.

ORDER XXXII.

AFFIDAVITS.

1. The Court or a Justice may, on the application of any party order that any person whose affidavit is proposed to be read in any proceeding shall attend before the Court or Justice, or an officer of the Court, or commissioner of affidavits, for cross-examination upon the affidavit.

Cross-examination of deponents.
Ct., E. Or. 38, r. 1.

As to evidence by affidavit on hearing of a matter, see H.C.P. Act, s. 20 (1); as to proof on trial of a cause of service of a document or signature thereto, *ib.* (2);

as to order of proof of particular facts by affidavit, or that affidavit of a person be read, *ib.* (3); as to appointment of commissioner, see H.C.P. Act, sec. 22; as to subpoena, see Or. 31, r. 12.

When it is desired to cross-examine a person on an affidavit made by him in support of a motion, the Judge who hears the motion is the Judge to make the order for the attendance of such person; *Merrillees v. Rhodes*, 17 A.L.T., 41. An application to cross-examine a defendant who had been arrested under a writ of *capias* on his affidavit filed in support of a summons for his release was refused in *Block v. Strettle*, 3 A.L.R. (C.N.), 81.

Title of
affidavits.

Cl., E. Or. 38,
r. 2.

2. Every affidavit shall be entitled in the cause or matter in which it is sworn, if any is then pending; but in any case in which there are more plaintiffs or defendants than one, it shall be sufficient to give the full name of the first plaintiff or defendant respectively, adding the words "and another," or "and others," as the case may be; and the costs occasioned by any unnecessary prolixity in the title shall be disallowed by the taxing officer.

If no cause or matter is pending, it shall not be necessary to entitle the affidavit otherwise than as provided by Order I., Rule 2.

As to title of affidavits in applications for writs of *certiorari*, *mandamus*, or prohibition, or for leave to exhibit informations of *quo warranto*, see Or. 41, r. 3.

An affidavit attached to and verifying an entitled petition need not be entitled; *In re Pirrie's Will*, 7 Q.L.J. (N.C.), 7.

As to amending the title of affidavits, see *Fattorini v. Fattorini*, 6 V.L.R. (L.), 454.

Contents of
affidavits.

Cl., E. Or. 33,
r. 3.

3. Affidavits shall be confined to facts to which the deponent is able to depose of his own knowledge, except in the cases specially provided for by these Rules, and except in the case of affidavits used on interlocutory motions or applications, in which statements as to the belief of the deponent, giving the sources of his information and the grounds of his belief, may be admitted.

For nature of evidence that is admissible on interlocutory applications, see *Miskin v. Meiklejohn*, 2 S.C.R. (Q.), 59.

In Queensland it has been held that an affidavit is not a communication within the meaning of that term in sec. 4 of the *Telegraph Messages Act* of 1872. The Court may, in a proper case, give leave to read an affidavit, the contents of which have been transmitted by telegraph under that section; but the correct method of bringing it before the Court is to annex it to an affidavit by the person to whom it is sent; *In re T.*, 9 Q.L.J. (N.C.), 95.

An affidavit of information and belief, not stating the source of information or belief, has been held in New South Wales to be irregular, and therefore inadmissible as evidence, and a party or solicitor attempting to use such an affidavit would do so at his peril as to costs; *Seward v. Quigley*, 18 W.N. (N.S.W.), 35.

4. Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and shall, as nearly as may be, be confined to a distinct portion of the subject. No costs shall be allowed for any affidavit or part of an affidavit which substantially violates this Rule.

Form of affidavit.
Cf., E. Or. 38, r. 7.

As to indorsement of affidavit, see r. 11, *infra*.

5. Every affidavit shall state the description and true place of abode of the deponent.

Description and abode of deponent to be stated.
E. Or. 38, r. 8.

As to power of Court to allow use of a defective affidavit, see r. 13, *infra*.

It is necessary that the description and place of abode of the deponent should be stated immediately after the deponent's name. An affidavit which is in the following form: "I, C.P., of Brisbane, in the State of Queensland, make oath and say as follows:—(1) I am (*stating description*)," is irregular, and the Judge may refuse to allow its use; *per* Griffith, C.J., in *R. v. Suess* (1902), Q.W.N., 40. In Victoria it was held by Williams, J., that this rule did not apply to affidavits made by a party to a cause who described himself as "the above-named party"; *Ellison v. Kerr*, 21 V.L.R., 332.

6. The jurat of an affidavit must state that it was signed and sworn by the deponent on the day and at the place where it was sworn. Each separate sheet must be signed by the deponent and by the person before whom the affidavit is taken, with the date and place of swearing added.

Jurat. Several sheets.
Q. Or. 41, r. 6.

Under r. 13, *infra*, the Court may allow a defective affidavit to be read. An affidavit was allowed to be read where the last sheet only was attested by the deponent and witness; *Re Carron*, 30th May, 1901 (Griffith, C.J.), cited in *Wilson and Graham, Supreme Court Practice*, (Q.), at p. 187.

In an affidavit sworn by several persons, and containing a separate jurat for each deponent, the first of the jurats was in order, and began: "Signed and sworn by the said," &c., but the second and each of the following jurats did not contain the words "Signed and sworn," but began, "and by the said," &c. *Held*, that the jurats were sufficient; *In re Jessop's Will*, 6 Q.L.J., 286 (Griffith, C.J.)

Hood, J. (Vic.), in Chambers laid down the following rule: "I shall not receive any affidavit written or printed on separate pieces of paper unless each page is identified by the commissioner before whom it is sworn"; *In re Affidavits*, 25 A.L.T., 94.

7. In an affidavit made by two or more deponents the names of the several persons making the affidavit must be inserted at length in the jurat, except that if the affidavit is sworn by all the deponents at the same time by the same officer it shall be sufficient to state that it was sworn by "both" or "all" the "above-named" deponents, using those words.

Affidavits made by two or more deponents.
E. Or. 38, r. 9.

Alterations in affidavits.

E. Or. 38, r. 12.

8. An affidavit which has either in the body thereof or in the jurat any interlineation, alteration, or erasure shall not, without leave of the Court or a Justice, be read or made use of in any cause or matter unless the interlineation or alteration, not being by erasure, is authenticated by the initials of the officer taking the affidavit, or, if the affidavit is taken in a Registry, either by his initials or by the office stamp; nor, in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialed in the margin of the affidavit by the officer taking it.

As to use of defective affidavits, see r. 13, *infra*; as to interlineations and erasures, see *Jansen v. Beaney*, 4 V.L.R. (L.), 167. *Per* Stawell, C.J.—“The object of requiring the initialling of an interlineation was to guard against any alteration in the affidavit after it had been sworn; but the Court is not precluded from receiving evidence that no such alteration has in fact been made.” As to erasures in the jurat, see *Reg. v. Foster, ex parte Molyneux*, 7 V.L.R. (L.), 294; where there was no evidence that the erasure in the jurat had been made before the affidavit was sworn, the Court declined to consider its contents.

Affidavits by illiterate or blind persons.

E. Or. 38, r. 13.

9. When an affidavit is sworn by any person who appears to the officer before whom it is taken to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature or mark in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court or a Justice is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent.

Affirmation.

Q. Or. 41, r. 10.

10. When a deponent does not take an oath, the form of jurat shall be varied, and the necessary alterations made so as to conform with the solemn affirmation or other declaration of the deponent.

As to form of affirmation, see H.C.P. Act, sec. 18.

Affidavits to be filed.

Cf., E. Or. 38, r. 10.

11. Every affidavit shall be filed in the Registry. A note shall be indorsed on every affidavit stating the name of the deponent and on whose behalf it is filed, and no affidavit shall, without the leave of the Court or a Justice, be filed or used without this note indorsed thereon.

As to stamping of affidavits, see r. 15, *infra*.

The fee for filing an affidavit, unless otherwise provided, is 2s. 6d.; Rule of Court, October 6th, 1903.

Where an order of the Court has been made upon affidavits, one of which was not filed when application was made for the order, the Court has power, where

the order has not been drawn up, to allow such affidavit to be afterwards filed, and then to order that such order should be drawn up as on reading such affidavit, and the other affidavits omitting the date of filing such affidavit; *In re Melb. Permanent Building Society*, 20 V.L.R., 252.

The omission in an affidavit of a note stating on whose behalf it is filed is an irregularity only and is curable; *Chester v. Varty*, 23 V.L.R., 28. See also *Rudduck v. Clarke*, 6 A.L.T., 46.

Every affidavit must be indorsed on the outside of the fold with the name of the deponent; *In re Marsh* (1902), Q.W.N., 45.

Where affidavits had not been actually read on a motion it was held that they could not be entered as read in the order to be drawn up by the Registrar, and consequently the costs of them were disallowed; *South Australian L.M. & A. Co. v. McInnes*, 7 Q.L.J. (N.C.), 10.

12. The Court or a Justice may order any matter which is scandalous to be struck out from any affidavit, and may order the costs of any application to strike out such matter to be paid as between solicitor and client. Scandalous matter. E. Or. 38, r. 11.

As a general rule an affidavit once filed cannot afterwards be taken off the file by the maker. Any person injuriously affected thereby may make such an application; *In re Verner*, 3 S.C.R. (Q.), 174.

The Court has power to strike scandalous and irrelevant matter out of an affidavit at the instance of a person not party to the cause; *Macpherson v. Kerr, ex parte Lewis*, 19 V.L.R., 23.

As to the disallowance of costs of affidavits containing scandalous matter, see *Slark v. Burt*, 1 S.C.R. (Q.), 50.

In New South Wales it was held that affidavits would not be ordered to be taken off the file as containing matter undesirable to be recorded when such matter was part of the evidence upon which the order of the Court was based; *In re Bowes' Settled Estates*, 19 W.N. (N.S.W.), 189.

13. Notwithstanding anything in the preceding Rules of this Order, the Court or a Justice may receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect, by misdescription of parties or otherwise, in the title or jurat, or any other irregularity, and may direct a memorandum to be made on the affidavit that it has been so received. Use of defective affidavit. E. Or. 38, r. 14.

As to non-compliance with rules not rendering proceedings void, see Or. 49, r. 5.

The power conferred by a similar rule in Queensland has been exercised by the Judges when the error has arisen from the ignorance of the person attesting the affidavit, when the affidavit has been executed abroad, or in remote parts of the State, and when great hardships would result if the affidavit were rejected; *Wilson and Graham, The Practice of the Supreme Court* (Q.), p. 189. See also, *In re Carron* and *In re Jessop's Will*; r. 6, *supra*.

Where a defect is one of misdescription only the Court would in case of urgency allow the affidavit to be used. Affidavits must be drawn in the prescribed form, and carefully prepared; and, as a general rule, permission to use affidavits containing irregularities and defects which could, with care, have been avoided, will not be given, unless some ground of urgency is shown; increased expense and delay arising through the preparation of defective affidavits is not a sufficient ground; *In re Johnson*, (1903) Q.W.N., 12.

Exhibits.
Cf., E. Or. 38,
r. 23.

14. Every sheet of an annexure or exhibit to an affidavit shall be certified by the officer before whom the affidavit is taken, and signed by the deponent. Every such certificate shall be marked with the short title of the cause or matter.

The fee on filing exhibits referred to in an affidavit and not annexed thereto, and required to be filed, is for each exhibit 1s. ; Rule of Court, October 6th, 1901.

Stamping of
affidavits and
use of office
copies.
Cf., E. Or. 38,
r. 15.

15. Before an original affidavit is allowed to be used, it shall be stamped with a filing stamp to be kept for that purpose, and, if not already filed, shall at the time when it is used be delivered to and left with the proper officer in Court or in Chambers, who shall send it to be filed. An office copy of an affidavit may be used instead of the original, the original affidavit having been previously filed, and the copy being duly authenticated with the seal of the office.

As to filing affidavits, see r. 11, *supra*; as to use of defective affidavits, see r. 13, *supra*; as to office copies, see Or. 49, r. 4.

Affidavit sworn
before solicitor
or his agent.
Cf., E. Or. 38,
rr. 16, 17.

16. An affidavit sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent, clerk, partner, or correspondent of such solicitor, or before the party himself, shall not be received.

Special times for
filing affidavits.
E. Or. 38, r. 18.

17. When a special time is limited for filing affidavits, an affidavit filed after that time shall not be used without leave of the Court or a Justice.

Affidavits in
support of *ex
parte*
applications.
Cf., E. Or. 38,
r. 19.

18. Except by leave of the Court or a Justice an order made *ex parte* in Court founded on any affidavit shall not be drawn up unless the affidavit on which the application was founded was actually made before the order was applied for, and was produced or filed at the time of making the motion.

ORDER XXXIII.

MOTION FOR JUDGMENT.

Motion for
judgment.
Cf., E. Or. 40,
r. 1.

1. Except when by these Rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained upon motion for judgment.

As to entering final judgment in default of appearance, see Or. 10 ; in default of pleadings, see Or. 23 ; as to judgment or order upon admissions of fact, see Or. 27, r. 3 ; the fee on hearing an action on motion for judgment is 10s. ; Rule of Court, October 6th, 1903.

Where a Judge has reserved a case or points in a case for the determination of the Full Court, he is bound by such determination, and must direct the entry of judgment accordingly ; *May v. Martin*, 12 V.L.R., 115 ; 7 A.L.T., 130. On motion for judgment in an action in which the Full Court has decided points of law reserved by the Judge at the trial, an order of the Full Court thereon should be produced ; *Attorney-General v. Symes*, 11 V.L.R., 544. On motion for judgment upon a referee report the Court, in coming to its decision, must discard absolutely all exhibits used at the trial before the referee, except such as are made part of the referee's report ; *Moore v. Fergusson*, 18 V.L.R., 266.

2. When at the trial of a cause the Justice does not direct any judgment to be entered, the plaintiff may set down the cause on motion for judgment. If he does not set down the cause and give notice of the setting down to the other parties within ten days after the trial, any defendant may set down the cause on motion for judgment and give notice of the setting down to the other parties.

When no judgment given at trial.

Cf., E. Or. 36, r. 30.

As to computation of time limited by this rule, see Or. 45.

3. When issues have been ordered to be tried, or questions or issues of fact have been ordered to be determined in any manner, the plaintiff may set down a motion for judgment as soon as such questions or issues have been determined. If he does not set down the motion, and give notice of the setting down to the other parties within ten days after his right so to do has arisen, any defendant may set down a motion for judgment, and give notice of the setting down to the other parties.

Setting down motion for judgment when issues have been directed and tried.

E. Or. 40, r. 7.

As to trial of issues with a jury, see H.C.P. Act, sec. 13 ; Or. 30, rr. 2, 5 ; as to trial of issues on new trial, H.C.P. Act, sec. 14 ; as to power of Court to direct trial of issue with jury at any time, see Or. 30, r. 3 ; as to the preparation and settling of issues, see Or. 28, r. 1 ; as to the trial of issues of fact without pleading, see Or. 29, rr. 9, *et seq.*

As to computation of the time limited by this rule, see Or. 45.

4. When issues have been ordered to be tried, or questions or issues of fact have been ordered to be determined in any manner, and some only of those questions or issues of fact have been tried or determined, any party who considers that the result of that trial or determination renders the trial or determination of the other questions or issues of fact unnecessary, or renders it desirable that their trial or determination should be postponed, may, by leave of the Court or a Justice, set down a motion for judgment, without waiting for such trial or determination. And the Court or Justice may, if satisfied of the

When some only of several issues directed have been tried.

E. Or. 40, r. 8.

expediency thereof, give such leave, upon such terms, if any, as is just, and may give any directions which are desirable as to postponing the trial of the other questions or issues of fact.

As to issues of fact being tried differently or one before the other, see Or. 30, r. 4.

Motion to be set down within one year.
E. Or. 40, r. 9.

5. A motion for judgment shall not, except by leave of the Court or a Justice, be set down after the expiration of one year from the time when the party seeking to set down the same first became entitled to do so.

Or. 40, r. 9 (Vic.), applies only to cases where no judgment has been entered by either party; *Gracie v. The President, &c., of the Shire of Tullaroop*, 12 V.L.R., 664.

Power of Court on motion for judgment.
Cf., E. Or. 40, r. 10.

6. Upon a motion for judgment, the Court may draw any inference of fact not inconsistent with the findings of the jury, if any, and may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if not so satisfied, direct the motion to stand over for further consideration, and may direct such questions or issues of fact to be tried or determined, and such accounts and inquiries to be taken and made, as are just.

As to setting down motion for judgment when issues have been directed and tried, see r. 3, *supra*.

In Queensland the power to set aside or disregard the findings of a jury is not confined to the Full Court, but may be exercised by a Judge of first instance where it appears on the hearing after trial, either from some point of law or from some fact not comprised in the questions of fact submitted to the jury, that the ultimate decision ought in point of law to be contrary to the findings. Where a jury had found on the unsupported testimony of the plaintiff that a declaration of trust had been made in her favour, and it clearly appeared that the trust was one relating to land, Chubb, J., set aside the findings of the jury, and directed judgment to be entered for the defendant, both on the ground of want of corroboration of the plaintiff's evidence, and also of the absence of the writing required by the *Statute of Frauds*; *Hendle v. Qualtrough*, 9 Q.L.J., 218.

In an action for wrongful forfeiture of shares the defendant pleaded (*inter alia*) acquiescence and delay. At the trial before a Judge and jury the questions on this defence were left by the parties to be decided by the Judge. After the hearing on the motion for judgment, an application by the defendants for leave to amend by pleading estoppel was refused by the Judge; but the Judge in delivering judgment, allowed the amendment, and, being of opinion that the conduct of the plaintiff had amounted to an estoppel, gave judgment for the defendants. *Held*, that as the question of estoppel had not been left by the parties to the Judge, he had no power to decide that question, and that a new trial must be had. The decision of the Judge was reversed and a new trial ordered; *Cashman v. No. 7 North Golden G.M. Co.*, 7 Q.L.J., 152.

ORDER XXXIV.

RELIEF AGAINST JUDGMENTS AND ORDERS.

1. When facts arise after the giving of a judgment or making of an order which entitle the person against whom the judgment or order is given or made to be relieved from it, or when facts are discovered after the giving of a judgment or making of an order which, if discovered in time, would have entitled the party against whom the judgment or order is given or made to a judgment or decision in his favour, or to a different judgment or order, he may apply to the Court or a Justice for a stay of execution or other appropriate relief; and the Court or a Justice may grant such relief, and for that purpose may direct such proceedings to be taken, and such questions or issue of fact to be tried or determined, and such inquiries to be made, as are just.

Matters arising
after judgment
or order.
Ct., E. Or. 42,
r. 27.

As to setting aside judgment obtained by default of appearance, see Or. 10, r. 8; of judgment obtained by default of pleading, see Or. 23, r. 11; judgment obtained by default of appearance at trial, see Or. 30, r. 18; as to staying proceedings generally, see Or. 38; as to the practice with respect to the setting aside judgments obtained on default in New South Wales, see *Rolin and Innes, Supreme Court Practice*, p. 26.

POWER OF COURT TO RESCIND, VARY OR STAY.—In *Lery v. Bryant*, 4 Q.L.J., 125. Harding, J., held that there was an inherent power in the Court to prevent an abuse of its proceedings, and a judgment would be set aside if the circumstances of the case required; In *Purcell v. Meston*, 5 Q.L.J., 118, Griffiths, C.J., was of the opinion that “whether a Judge had or had not power to rescind or vary a previous order without the consent of the parties, he certainly had power to stay proceedings under a previous order in an action if justice could not otherwise be done.” In *Woods v. Sheriff of Queensland*, 6 Q.L.J., 163, it was held by the Full Court, per Griffith, C.J., that “when an order is made *ex parte* the Court or Judge making it may, upon application of any person prejudicially affected by the order, review, and if necessary, discharge it. This is a rule of natural justice. But when a judgment or order is pronounced or made after hearing both sides, it is a general rule that the Court which pronounced the judgment or made the order cannot reverse or vary it. To this rule, which in my opinion applies equally to all judgments and orders, whether final or interlocutory, and whether pronounced by the Full Court or by a single Judge, and whether he is sitting in Court or in Chambers, there were, before the *Judicature Act*, exceptions.” The Court in this case relieved a plaintiff on his return to the jurisdiction from the operation of an order which required him, being then out of the jurisdiction, to give security for costs. In a later case, *Drep Creek Gold Dredging Co. v. Gympie Crushing Co.*, 8 Q.L.J., 123, the Full Court held it to be “perfectly clear that, even without formal reservation of liberty to apply, if there were a change of circumstances in the course of an action which made the original order (for security for costs) unsuitable to the altered circumstances, there would be power to make a further order.” As to amendment of order where there are clerical mistakes or accidental omissions, see Or. 24, r. 9, and the authorities there cited, p. 310, *supra*.

Ignorance of an existing fact, common to both parties to a consent judgment, and equally open to discovery by either, is not a mistake or misapprehension so as to entitle either of the parties to subsequently withdraw his consent, and have the judgment reversed before it is perfected; *The King (ex relatione Filcock) v. The Council of the Shire of Marong*, 25 A.L.T., 69.

Entry of satisfaction.
Q. Or. 45, r. 2.

2. Any party against whom a judgment is given may apply to the Court or a Justice for an order directing entry of satisfaction of the judgment to be made, and the Court or Justice may make the order accordingly.

Procedure under this order exclusive.
Q. Or. 45, r. 3.

3. No proceedings shall be taken for the purpose of obtaining relief from judgments or orders on the ground of facts arising or discovered after the judgment or order, except as by this Order provided.

ORDER XXXV.

ATTACHMENT AND COMMITTAL.

1. General.

For performance of an act.
Cl., E. Or. 42, rr. 4, 7.

1. A judgment or order for the payment of money into Court or for the performance of a judgment, order, or writ, by which any person is required to do any act other than the payment of money to some person, may be enforced by writ of attachment.

A judgment of the High Court may be enforced by execution against the person where it is allowed in a like case in the Supreme Court of the State in which it is sought to enforce the judgment; H.C.P. Act, sec. 26. When it is intended to enforce obedience to a judgment or order by process of attachment, the judgment or order must be personally served; Or. 47, r. 3; *Anderson v. Anderson*, Queensland Dig., col. 12.

The fee on sealing a writ of attachment is 5s. : Rule of Court, October 6th, 1903.

PAYMENT OF MONEY.—As to enforcing judgment for payment of money, see H.C.P. Act, sec. 26. In New South Wales, save, possibly, under exceptional circumstances, an order for payment of money or costs to a party cannot be enforced by attachment; *Breden v. Breden*, 1 N.S.W.L.R. (Div.), 9; *Sachs v. Beaumont*, 9 N.S.W.L.R. (Eq.), at p. 53. Compare also *Hartley v. Salmond*, 5 S.C.R. (Q.), 169.

PAYMENT OF COSTS.—It was held in Victoria, before the *Judicature Act*, that the Acts for the abolition of imprisonment for debt did not interfere with the power of the Court to issue an attachment for the disobedience of orders directing the payment of costs, see *Hamilton's Judicature Act*, p. 238; *Re Sandilands*, 4 V.L.R. (L.), 318; *In re Mccredy*, 20 V.L.R., at p. 432. It has since been held that, upon an application made *ex parte*, an order absolute may be made for the attachment of a party for non-payment of costs in proceedings in the probate jurisdiction; *In re Owen*, 19 V.L.R., 1. M.'s estate was sequestrated during his absence from the colony. On his return he sought to have the sequestration set aside, but afterwards abandoned the proceedings, and was ordered to pay costs. The costs were not

paid. Upon an application to attach M. for non-payment of the costs, it was alleged that he was unable, through want of means, to comply with the order of the Court directing payment. *Held*, that inability to comply with the order furnished no answer to the application, and that the writ of attachment should issue; *In re Mecredy*, 20 V.L.R., 431.

In divorce matters, in the Supreme Courts of the States, writs of attachment are issued to enforce the payment of costs and alimony.

In New South Wales the Court made an order, upon an application by the co-respondent, attaching the petitioner for non-payment of the respondent's costs of the suit; *Brown v. Brown*, 19 W.N. (N.S.W.), 303. The Court refused to grant a writ of attachment against a petitioner who was without means, and who, owing to severe injuries sustained in an accident, had been thrown out of employment, and had failed to comply with an interim order for payment of a sum towards his wife's costs. In dealing with orders for attachment, the Court will be guided by the particular circumstances of the case; *Webb v. Webb*, 19 W.N. (N.S.W.), 303. The Court will not exercise its discretion by refusing to make absolute a rule nisi for attachment granted against a husband for non-payment of his wife's costs, on the ground either that the husband is without means, or that he was the successful petitioner in the suit; *Taylor v. Taylor*, 19 W.N. (N.S.W.), 256.

An application for a rule absolute in the first instance for attachment for non-payment of costs was refused where a copy of the order was not recited in or annexed to the affidavit of service; *Burnett v. Burnett*, 19 W.N. (N.S.W.), 40.

NON-PAYMENT OF ALIMONY.—An order for attachment was made against a respondent, who, after a decree made in a suit in which he had been found guilty of adultery, and ordered to pay into Court a sum for alimony and maintenance, had become bankrupt, and failed to comply with the order; *Shervey v. Shervey*, 19 W.N. (N.S.W.), 304. In Victoria it has been held that the Court has power to grant attachment for breach of an order for permanent alimony; *Gilchrist v. Gilchrist*, 17 V.L.R., 724. As to service of notice of motion and demand, see *Jesse v. Jesse*, 20 W.N. (N.S.W.), 34.

CONSENT ORDER.—The Supreme Court ordered the defendant to pay within one month the sum of £25,000 in respect of breaches of trust by him, and an order was subsequently made that "the plaintiffs be at liberty to issue a writ or writs of attachment" against him for non-compliance with this order. A writ of attachment was issued under this order, but before it was executed, the parties arrived at a compromise which was embodied in a consent order. The defendant complied with the order in part, and two years later made default. An order was then made that the "plaintiffs be at liberty to sue out a writ or writs of attachment against the defendant for his contempt in not having paid the said sum of £25,000 pursuant to the original judgment." *Held* that this order was rightly made; *Hodgson v. Booth*, 28 V.L.R., 130.

PAYMENT OF TRUST FUNDS.—A trustee having admitted the receipt of certain trust funds, was ordered to pay the sum into Court; not having complied with this order, he was committed for contempt of Court. The trustee was not charged with any fraudulent or dishonest conduct in his dealings with the trust funds. *Held*, that his contempt was purged by filing a bankruptcy petition; *Molyneux v. Wilson*, 15 N.S.W.L.R. (E.), 109.

RULE OF COURT.—"The power of a Court of Equity to issue a writ of attachment for disobedience to its orders is part of the inherent jurisdiction which the Court has to punish for contempt of Court, disobedience to an order of the Court being merely one species of contempt. Though the Court may have inherent power to enforce obedience to all its orders by attachment, that power in particular instances may be waived by the Court, and if it is so waived the parties are not entitled to obtain a writ of attachment in order to assist them to enforce the orders of the Court. When the Court, by laying down rules for its guidance no less than for the guidance of suitors, has directed the course of practice to be observed, the Court is bound by those rules, and the only remedy which a party is entitled to is that prescribed by the rules. He cannot go outside of those rules and apply to the Court to exercise some power or jurisdiction which may inhere in the Court, but which the Court has waived or abandoned in this particular instance by prescribing a different remedy": *per* Owen, C.J., in *Eq.*; *Sachs v. Beaumont*, 9 N.S.W. L.R. (E.), at p. 52.

SETTING ASIDE ORDER.—A petitioner obtained a writ of attachment against the respondent. The petitioner having been committed for trial for perjury in respect of statements made in her affidavits upon which the order for attachment was made, a stay of proceedings under the attachment order was granted upon terms. The petitioner having been convicted of perjury, the Court set aside the order for attachment, and refused to allow any costs of the proceedings to the petitioner; *Hanslow v. Hanslow* (No. 3), 20 W.N. (N.S.W.), 208.

PAYMENT OF COSTS OF APPLICATION.—Where on an application for the release of a person committed for contempt, it appeared that the applicant had been thirteen weeks in gaol, and had become insolvent, but had not paid the costs of the motion for his committal, Griffith, C.J., refused to make an order for his discharge. *Semble*, that the payment of the costs of a motion to commit is not an absolute condition precedent to the discharge of the person committed. *Ex parte Nicholas*, 11 Q.L.J. (N.C.), 39.

RELEASE.—The sheriff in New South Wales is not entitled to order the release of a person attached for contempt; *McKnight v. McKnight*, 20 W.N. (N.S.W.), 65.

Judgment to
abstain from any
act.

Cf. E. Or. 42,
r. 7.

2. A judgment or order requiring any person to abstain from doing any act may be enforced by committal.

As to committal for contempt, see note to *Jud. Act*, sec. 24, *supra*, p. 96; Or. 43; as to application for committal being made by motion upon notice, see r. 6, *infra*.

Undertakings.
Q. Or. 47, r. 8.

3 An undertaking to do any act other than the payment of money to some person may be enforced in the same manner as a judgment requiring a person to do an act, and an undertaking to abstain from doing an act may be enforced in the same manner as a judgment requiring a person to abstain from doing an act.

In the case of non-performance of an undertaking to pay money to any person, the Court or a Justice may make an order for payment of the money, which may be enforced in the same manner as a judgment for the recovery of money.

As to a solicitor failing to enter an appearance pursuant to an undertaking, see Or. 9, r. 9. In *Darley v. Hyman*, 15 N.S.W. L. R. (L.), 189, it was held that if an attorney gives an undertaking to enter an appearance, and does not appear, the Court will attach him, even though he has given the undertaking without the authority of the defendant. An attorney, having given the undertaking but failed to appear, was ordered to enter an appearance; *Squires v. Weeks*, 9 W.N. (N.S.W.), 122.

2. Attachment.

4. A writ of attachment shall not be issued without the leave of the Court or a Justice, to be applied for on notice to the party against whom the attachment is to be issued.

Application for leave to issue writ of attachment.
E. Or. 44, r. 2.

As to return of writ, see Or. 44, r. 4; a party who fails to comply with an order to answer interrogatories or discovery or inspection is liable to attachment; Or. 26, r. 19; as to attachment of solicitor, *ib.*, r. 21.

5. In the case of non-performance of an undertaking, the Court or a Justice may, in the first instance, instead of directing the issue of a writ of attachment, make a peremptory order for the performance of the act undertaken to be done.

Court may make peremptory order before issue of writ.
Q. Or. 53, r. 4.

3. Committal.

6. Applications for committal for disobedience to a judgment or order requiring a person to abstain from doing any act shall be made by motion upon notice, which must be served personally, unless the Court or a Justice authorizes substituted service.

Motion for committal.
Q. Or. 53, r. 6.

As to judgment or order requiring person to abstain from doing any act, being enforced by committal, see r. 2, *supra*; as to committal for contempt, see Or. 43; as to personal service, see Or. 47.

7. The provisions of Order XLIII. relating to committal for contempt of Court shall apply to applications for committal, and to persons committed, for disobedience to judgments or orders.

Order XLIII. to apply.
Q. Or. 53, r. 8.

ORDER XXXVI.

ACTIONS BY AND AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN.

1. Any two or more persons claiming or being liable as partners and carrying on business within the Commonwealth may sue or be sued in the name of the respective firms, if any, of which they were partners at the time of the accruing of the cause of action.

Actions by and against firms within the Commonwealth.
Ct., E. Or. 48a, r. 1.

As to applications of this order to actions between co-partners, see r. 11, *infra*; against a person trading as a firm, see r. 12, *infra*; as to disclosure and order for disclosure of partners' names and addresses, see rr. 2, 4, *infra*; as to service, see r. 5, *infra*; as to appearance, see rr. 7, 8, *infra*.

Partners out of the jurisdiction cannot be sued in the name of the firm; *Alfred Shaw & Co. Ltd. v. Drake and Stubbs*, 8 Q.L.J., 12; *Sharp v. Ball and Ellis*, 19 V.L.R., 459.

Where an individual sues in the name of the firm under which he trades, such proceeding is an irregularity only, and can be amended under Or. 70 (Vic.), cf. Or. 49, r. 5, *et seq.*; *Baxter & Co. v. Hill and Christie*, 22 V.L.R., 226. The *Registration of Firms Act 1892* does not enable an individual to bring an action in his firm name, if he could not do so before the passing of the Act; *per Hood, J., C. W. Baxter & Co. v. Hill and Christie*, 17 A.L.T., at p. 333.

Disclosure of
partners' names.
Cl., E. Or. 48a,
r. 2.

2. When partners sue in the name of their firm, the plaintiffs or their solicitor shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm in whose name the action is brought; and if the plaintiffs or their solicitor fail to comply with the demand, all proceedings in the action may be stayed upon such terms as the Court or a Justice directs.

Action to
continue in
name of firm.
Cl., E. Or. 48a,
r. 2.

3. When the names of the partners are declared, the action shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as the plaintiffs in the originating proceeding. But all the proceedings shall, nevertheless, continue in the name of the firm.

Order for
disclosure.
Cl., E. Or. 48a,
r. 1.

4. In any case in which partners sue or are sued in the name of their firm under Rule 1 of this Order, any party to the cause may apply to a Justice for an order directing that a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in the firm, shall be furnished in such manner, and verified on oath or otherwise, as the Justice directs.

A plaintiff sued the firm of George Alexander & Co. An appearance was entered by T. D. Kneen as one of the partners of the above-named firm of George Alexander & Co. An order was made that the defendant, Kneen, should disclose on oath the names of his partners. He disclosed a name of George Alexander and stated the partnership had been dissolved. The plaintiff was allowed to amend his writ by inserting before the words George Alexander & Co., the words "George Alexander and Thomas Daniel Kneen trading as," &c.; *Brundell v. Alexander & Co.*, 8 A.L.T., 65.

Service.
Cl., E. Or. 48a,
r. 3.

5. When persons are sued as partners in the name of their firm under Rule 1 of this Order, the originating proceeding shall be served either upon some one or more of the partners, or at the principal place, within the Commonwealth, of the business of the partnership upon some person having at the time of service the control or management of the partnership business there; and, subject to these Rules, such service shall be deemed good service upon the firm whether any of the members thereof are beyond the Commonwealth or not. Provided

that in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the commencement of the action, the originating proceeding shall be served upon every person within the Commonwealth sought to be made liable.

As to delivery to person served of notice of the character in which he is served, see r. 6, *infra* ; as to appearance, see rr. 8, 9 ; as to service of originating proceedings generally, see Or. 7.

Action against H. and K. who were partners upon a cheque drawn by them. They were not sued in the name of the firm, but as joint contractors. The writ was served upon the manager of the two partners. The service, which was defective under sec. 19 of the *Instruments and Securities Statute 1864* (Vic.), was treated by K. as good service, and he took steps to defend the action. H. was out of the jurisdiction, and so was not served. Application, in Chambers, by K. that all further proceedings against him should be stayed until the writ was served upon H., and he had appeared, or judgment had been signed against him. *Held, per Higinbotham J.*, that K., having accepted the service, was in no better position than he would have been in, if, under the old procedure, he had been sued alone for a debt jointly due by him and another person, in which he could only have compelled the joinder of the other contracting party, by giving the plaintiff a better writ ; that under the new Rules, even this limited right is taken away, for under Or. 16, r. 6 (Vic.), a plaintiff is at liberty to join one or more only of the parties liable, and, under r. 4 of the same Order, judgment may be signed against one or more defendants, who may be found to be liable, without amendment ; application dismissed with costs ; *Oriental Bank v. Halstead*, 6 A.L.T., 30.

6. When persons are sued as partners, and the originating proceeding is served as directed by the last preceding Rule, there shall be delivered with it to every person upon whom it is served a notice in writing stating whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters. In the absence of such notice, the person served shall be deemed to be served as a partner.

Notice in what capacity served.
Cf., E. Or. 48a, r. 4.

7. When persons are sued as partners in the name of their firm, they shall appear individually in their own names ; but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

Appearance of partners.
E. Or. 48a, r. 5.

As to no appearance except by partners, see r. 8, *infra* ; as to conditional appearance, see r. 9, *infra* ; as to appearance generally, see Or. 9.

8. When a writ is served under Rule 5 of this Order upon a person having the control or management of the partnership business, an appearance by him shall not be necessary unless he is a member of the firm sued.

No appearance except by partners.
E. Or. 48a, r. 6.

9. Any person served as a partner under Rule 5 of this Order may enter a conditional appearance, denying that he is a partner, but such appearance shall not preclude the plaintiff from duly serving the

Appearance under protest of person served as partner.

Cl., E. Or. 48a,
r. 7.

firm otherwise than by service upon him, and obtaining judgment against the firm in default of appearance if no partner enters an appearance in the ordinary form.

As to the entry of conditional appearance generally, see Or. 9, r. 12.

Execution of
judgment
against a firm.
Cl., E. Or. 48a,
r. 8.

10. When a judgment or order is given or made against a firm, execution may issue :—

- (a) Against any property of the partnership within the Commonwealth ;
- (b) Against any person who has appeared in the action in his own name, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner ;
- (c) Against any person who has been individually served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained the judgment or order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Justice for leave so to do; and the Court or Justice may give such leave if the liability of the other person is not disputed, or, if such liability is disputed, may order that the liability of that person be tried in any manner in which any question or issue of fact in an action may be tried.

But, except as against any property of the partnership, a judgment against a firm shall not render liable, or release, or otherwise affect, any member thereof who was beyond the Commonwealth when the cause was commenced, and who has not appeared in the cause, unless he has been served within the Commonwealth with the originating proceeding, or the plaintiff has obtained liberty to proceed in the action against him under Order VIII.

Or. 8 deals with service out of the jurisdiction in specified cases, and for the subsequent proceedings with the leave of the Court or a Justice. As to trial of issues of fact, see H.C.P. Act, secs. 12, 13 ; Or. 30, r. 2, *et seq.* ; as to execution, see H.C.P. Act, sec. 26.

Application of
Rules to actions
between
co-partners.
E. Or. 48a, r. 10.

11. This Order shall apply to actions between a firm and one or more of its members, and to actions between firms having one or more members in common, provided that the firm or firms carry on business within the Commonwealth. But execution shall not be issued in such actions without leave of the Court or a Justice, and on an application for leave to issue execution all such accounts and inquiries may be directed to be taken and made, and directions given, as are just.

As to inquiries and accounts, see Or. 28, r. 2.

As to appointment of receiver in action for dissolution of partnership, see *Groves v. Matthew*, 9 Q.L.J. (N.C.), 58; note to Or. 37, r. 12.

12. Any person carrying on business within the Commonwealth in a name or style other than his own name may be sued in that name or style as if it were a firm name; and, so far as the nature of the case will permit, all the Rules of this Order relating to proceedings against firms shall apply to any such case.

Application of Rules to person trading as a firm.
E. Or. 48a, r. 11.

As to person suing in firm name, see note to r. 1.

ORDER XXXVII.

INSPECTION OF PROPERTY: INTERIM PRESERVATION, CUSTODY, AND MANAGEMENT OF PROPERTY: RECEIVERS: STOP ORDERS.

1. *Interim Preservation, Custody, and Management of Property.*

1. The Court or a Justice may, upon the application of any party to a cause or matter, and upon such terms as are just, make any order that is necessary for the inspection, detention, or preservation, of any property or thing, being the subject-matter of the litigation, or as to which any question may arise therein, and for any such purposes may authorize any person to enter upon or into any land or building in the possession of any party to the cause or matter, and for any such purposes may authorize any samples to be taken, or any observation to be made or experiment to be tried, which is necessary or expedient for the purpose of obtaining full information or evidence.

Inspection, detention, or preservation of property the subject of an action.
E. Or. 60, r. 3.

As to applications relating to the custody, management, or preservation of property being made in Chambers, see *Jud. Act.*, sec. 16; as to time for making the application, see r. 7, *infra*; as to application for inspection by a jury, see r. 3, *infra*; as to the preservation or interim custody of the subject-matter of a disputed contract, see r. 4, *infra*; as to order for sale of perishable goods, see r. 6, *infra*; as to inspection of documents, see Or. 26, r. 11, *et seq.*

In a suit for infringement of patent, where the defendant had applied for a patent, the plaintiff was allowed to personally inspect the defendant's patent; *Musson v. Fletcher*, 6 W.N. (N.S.W.), 159. Inspection of a mine was ordered in *Mayor of Bollarat East v. Victoria United M. Co.*, 4 V.L.R. (E.), 10; *Attorney-General v. Lansell*, 6 V.L.R. (E.), 134; see also *Parker's Freehold v. Parker's United Co.*, 7 V.L.R. (E.), 16.

An order for the transfer of possession of property cannot be made on an interlocutory motion for the recovery of the property; *Royal Bank of Queensland v. Ryan*, 8 Q.L.J., 97 (Griffith, C.J.).

2. Any Justice by whom any cause or matter is heard or tried, with or without a jury, or before whom any cause or matter is brought by way of appeal, may inspect any property or thing concerning which any question arises therein.

Inspection by Justice.
E. Or. 60, r. 4.

Inspection by jury.
Cf., E. Or. 50, r. 6.

3. The provisions of Rule 1 of this Order as to inspection shall apply to inspection by a jury, and in that case the Court or a Justice may make all such orders upon the Marshal or other proper officer as are necessary to procure the attendance of the jury at such time and place, and in such manner as the Court or Justice thinks fit.

The Court or Justice shall by the order make such provision as to defraying the expenses of the inspection as is just.

Preservation or interim custody of subject-matter of disputed contract.
Cf., E. Or. 50, r. 1.

4. When a *prima facie* case of liability under a contract is established, the Court or a Justice may make an order for the preservation or interim custody of the subject-matter of the litigation, notwithstanding that there is alleged as matter of defence a right to be relieved wholly or partially from the liability; or may order that the amount in dispute be brought into Court or otherwise secured.

As to the time at which an application for such an order may be made, see r. 5, *infra*; as to payment into Court, see Or. 18.

Application when and how made.
Cf., E. Or. 50, r. 7.

5. An application for an order under the last preceding Rule may be made by the plaintiff at any time; and may be made upon the pleadings, if his right appears by the pleadings; or, if there are no pleadings, upon proof of the facts by affidavit or otherwise to the satisfaction of the Court or a Justice.

As to trial without pleadings, see Or. 13.

Order for sale of perishable goods, &c.
Cf., E. Or. 50, r. 21.

6. The Court or a Justice may, on the application of any party to a cause or matter, make an order for the sale, by any persons named in the order, and in such manner, and on such terms as the Court or Justice thinks desirable, of any goods, wares, or merchandise being the subject of the cause or matter, or as to which any question arises therein, which are of a perishable nature or likely to be injured by keeping them, or which for any other just and sufficient reason it is desirable to have sold at once.

As to time for making application, see r. 7, *infra*.

Applications for injunction or receiver or for Order under Rule 1 or 6.
Cf., E. Or. 50, r. 6.

7. An application for an injunction or receiver, or for an order under Rule 1 or Rule 6 of this Order, may be made to the Court or a Justice by any party. An application for an injunction or receiver may be made either *ex parte* or upon notice. An application for an order under Rule 1 or Rule 6 may be made upon notice to the opposite party at any time after the commencement of the cause, and, if the party making the application is not the plaintiff, after appearance by him.

As to injunctions against an officer of the Commonwealth, see Constitution, sec. 75 (v.), *supra*, pp. 103, 124; as to injunctions against a State and its officers, see *Jud. Act*, sec. 60.

Under the *Judicature Act*, as adopted in several of the States, and under sec. 16 (1) of the *Equity Act 1901* (N.S.W.), an injunction may be granted by an interlocutory order in all cases in which it appears to the Court to be just or convenient.

OBJECT OF INTERLOCUTORY INJUNCTION.—"Injunctions are of two kinds, prohibitory and mandatory, both having the same object. The object of an interlocutory injunction is to preserve the property pending the litigation, so that by the acts of the parties during the litigation, the property shall be available to the successful party in the state in which it was; in other words neither party shall be injured by the delay that is necessarily caused in the prosecution of the action until the hearing. Prohibitory injunctions are for restraining destruction, and restraining the person having the property from dealing with vested rights, and restraining him from doing any injurious act. A mandatory injunction is one that orders a party to do something. Now I see no reason why the same principle which applies to the one should not apply to the other, namely, the preservation of the rights until the hearing." *Per* Harding, J., *Emmott v. Queensland Mercantile Co. Ltd.*, 4 Q.L.J., at p. 168.

PRIMA FACIE CASE.—"On a motion for an interlocutory injunction all that the plaintiff has to make out is a fair *prima facie* case. If he satisfies the Court that he has a fair question to raise, then the Court may in its discretion impose such a reasonable and necessary restraint as will prevent the mischief apprehended and preserve the rights of the plaintiff until the hearing. It is not necessary that it should be clear that the plaintiff will succeed at the trial, if there is ground for supposing that relief may be given." *Per* Chubb, J., *Allen & Sons Ltd. v. Clifton*, (1902) S.R. (Q.), at p. 175. Where a *prima facie* case was not established on the affidavits, it was held on appeal that the Judge was right in refusing to extend an injunction; *Little v. Welsh*, 4 W.A.L.R., 5.

GENERAL PRINCIPLES.—The granting of an interlocutory injunction is in the discretion of the Court, which will consider the balance of convenience in granting or refusing it, and, unless it is clearly shown that the plaintiff is in the right, will refuse such an injunction; *Atkinson v. Moss*, 14 V.L.R., 146. The principle on which the Court acts in granting interlocutory injunctions, is to consider on which side the balance of inconvenience most presses; *Williams v. Ryan*, 8 A.L.T., 49. Where, by the granting of an interlocutory injunction irreparable mischief would be done to a defendant, who may at the trial be able to show that an injunction ought not to be granted against him, the Court will refuse the interlocutory injunction; *Atkinson v. Moss*, 14 V.L.R., 146. In an action of ejectment and for a perpetual injunction to restrain trespass an interlocutory injunction will not be granted unless some urgency is shown, or it is shown that irreparable damage will be done if the application be not granted; *Metropolitan Bank Ltd. v. Christensen*, 21 V.L.R., 288.

In considering a motion for an injunction, the Court will not disregard a plaintiff's rights because the infringement is small, nor will it consider the public benefit that would accrue from the act sought to be restrained as of paramount importance; *Brooks v. The Queen*, 10 V.L.R. (E.), at p. 110.

It does not follow that a party having a legal right may enforce it by injunction. His conduct may in many ways deprive him of the right to such a remedy especially where the obtaining of an *ex parte* injunction is stopped without

having been heard. Courts of Equity are anxious to require a full disclosure of facts which may become material, and discharge with costs orders improperly obtained, although ultimately the facts suppressed may not be material. It is a question of the general policy of Court and not of the merits between the parties. A subject upon which Courts are specially anxious for information is the precise time at which the plaintiff or his agents became aware of the threatened injury; *Adelaide Steamship Co. v. Martin*, 5 V.L.R. (E.), 45.

Where a defendant has been illicitly pirating matter from the plaintiff's periodical the Court should do more than merely restrain the repetition of such copying, and should extend the injunction to such copying as may be reasonably expected thereafter; *Wilson v. Luke*, 1 V.L.R. (E.), 127, followed; *Trade Auxiliary Co. v. Middlesborough and District Tradesmen's Protection Association*, 40 Ch. D., 425; and *Cate v. Devon and Exeter Consti. News. Co.*, 40 Ch. D., 500, commented upon; *Hall v. Whittington & Co.*, 18 V.L.R. 525. See also r. 10, *infra*.

Though a man who has been employed by a firm of established reputation has a right, on setting up an independent business, to make known to the public that he has been with that firm, yet he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm or that he is in any way connected with it. He must not mislead the public to the detriment of his former employers, or use any means whereby purchasers may be induced to believe that his wares are really those of another person; *Garde v. Mitchell*, 17 V.L.R., 209.

The Court of Appeal may, pending an appeal to the Full Court, grant an injunction to restrain the defendants in an action from selling or mortgaging land the subject of the action; *Rismondo v. Rismondo*, 12 V.L.R., 101.

ACQUIESCENCE.—Plaintiffs sought an injunction to restrain defendants from allowing water from their drive to pass into and flood that of plaintiffs'. *Held*, that having regard to the plaintiffs' long acquiescence in defendants' works, against which they did not seem to have remonstrated during much of their progress, and the defendants' outlay, such injunction would not be granted; *Broadbent v. Marshall*, 2 W. & W. (E.), 115. As to acquiescence and delay, see also *Nera Stearine Co. v. Mowling*, 9 V.L.R. (E.), 98. The right to interlocutory relief may be lost by acquiescence or conduct, even though such acquiescence or conduct would not be a bar at the trial; *Atkinson v. Moss*, 14 V.L.R., 146. For circumstances under which a plaintiff was held to have lost by acquiescence his right to an interlocutory injunction to restrain a breach of a restrictive agreement of personal service, see *Bupty v. Waldorf*, 19 W.N. (N.S.W.), 73.

DELAY.—Where a bill was filed in December, 1878, answer delivered 1st February, 1879, and motion for injunction brought in July, 1879, an injunction was refused on the ground of delay in bringing the motion; *Chinn v. Thomas*, 5 V.L.R. (E.), 188.

INTEREST TRANSFERRED.—Where it appeared by the uncontradicted affidavit of a defendant, sought to be enjoined, that he had, before suit, parted with all his interest in the land in question in the suit, a motion for an injunction was dismissed; *Newington Freehold G.M. Co. v. Harris*, 3 W.W. & A'B. (E.), 174.

PAST INJURIES.—Injunctions are not granted with reference to accomplished injuries; *Boushain Freehold G.M. Co. v. Prince of Wales Co.*, 5 W.W. & A'B. (E.), 154.

NON-RETROSPECTIVE.—An injunction is not to be interpreted retrospectively unless its terms clearly require it; *Mulcahy v. Walhalla G.M. Co.*, 5 W.W. & A'B. (E.), 103.

PRACTICE.—As to the practice in New South Wales with respect to injunctions, see *Rich, Newham and Harvey, Practice in Equity*, p. 16.

In Victoria an application by summons for an injunction may be made before entry of appearance, without leave of the Court or Judge; *Skinner v. Australian and British &c. Co.*, 19 A.L.T., 226.

Seemle the Court in Queensland will not grant an interlocutory injunction *ex parte* on the application of the plaintiff after the defendant has appeared, except in cases of extreme urgency; *Woolfe v. Allan and Sons Ltd.*, 8 Q.L.J. (N.C.), 15.

A plaintiff in an action for an injunction cannot obtain, on an application for an interlocutory injunction, all the relief sought by the action; *Emmott v. Queensland Mercantile Co. Ltd.*, 4 Q.L.J., 166.

On a motion for an injunction to restrain the defendant, her agents, &c., until the hearing of the action from selling or transferring an agricultural farm to any person other than the plaintiff, and from delivering or authorizing the delivery to any person other than the plaintiff of any deed of grant or other document of title relating to land, Griffith, C.J., granted the injunction, and, in the course of the hearing, made the following remarks in reference to the practice to be followed in Queensland on applications for injunctions:—"Motions for injunctions should be made by counsel in order of seniority, and should not be set down on the paper. If the injunction is the only relief sought, the motion may be taken at the trial during the hearing"; *Shailer v. Williamson* (1902), Q.W.N., 8.

According to the Queensland practice, an interim injunction expires at the time stated therein. If it is desired to continue the interim injunction for a longer period, another application should be made. The application for injunction in Queensland is made by notice of motion, which notice of motion has to be served two clear days before the hearing. If, however, no appearance has been entered in the action, service may be effected by posting the notice of motion in the registry for two clear days (cf., Or. 47, r. 6); *per* Griffith, C.J., *Broadhurst v. Nicol* (1902), Q.W.N., 21.

As to appeals from the discretion of a Judge in granting or refusing an injunction, see *Broadfoot v. Foxwell*, 7 Q.L.J., 4.

8. When an application is made before trial for an injunction or other order, and it appears to the Court or Justice that the matter in controversy in the cause can be most conveniently dealt with by an early trial, without first going into the whole merits on affidavit or other evidence for the purposes of the application, the Court or Justice may, subject to the right of either party to demand a jury, make an order for such trial accordingly, and may direct the trial to be had at any time or place, and in any manner in which a cause may be tried,

Early trial of cause.
(cf., E. Or. 50, r. 1a.)

and in the meantime may make such order as the justice of the case requires.

Parties are not entitled as of right to a jury, see H.C.P. Act, sec. 12; see also Or. 30, r. 2.

Order for
recovery of
specific
property, other
than land
subject to lien,
&c.
Cf., E. Or. 50,
r. 8.

9. When an action is brought to recover specific property other than land, and it appears from the pleadings, or, if there are no pleadings, it is made to appear, by affidavit or otherwise, to the satisfaction of the Court or a Justice, that the party from whom recovery is sought does not dispute the title of the party seeking to recover the property, but claims to retain it by virtue of a lien, or otherwise as security for any sum of money, the Court or a Justice may at any time order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum, if any, for interest and costs as the Court or Justice directs, and that, upon such payment into Court being made, the property claimed shall be given up to the party claiming it.

As to trial without pleadings, see Or. 13.

Injunction
against
repetition of
wrongful act or
breach of
contract.
E. Or. 50, r. 12.

10. In any action in which an injunction has been or might have been claimed, the plaintiff may, before or after judgment, apply for an injunction to restrain the defendant or respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any injury or breach of contract of a like kind relating to the same property or right, or arising out of the same contract; and the Court or a Justice may grant the injunction, either upon or without terms, as may be just.

See *Hall v. Whittington*, 18 V.L.R., 25, cited p. 364, *supra*.

Damages for
injunction
wrongly
granted.
Q. Or. 58, r. 12.

11. Every interlocutory order for an injunction shall contain an undertaking by the party at whose instance it is granted to pay to the opposite party any damages which such opposite party may sustain by reason of the injunction, and which the Court or Justice thinks he ought to pay.

An application for an order for payment of such damages shall be made by motion, and the damages may be ordered to be assessed in any manner in which damages may be assessed in an action.

As to assessment of damages in an action by writ of inquiry, see Or. 30, r. 25, *et seq.*; as to enforcing undertaking, see Or. 35, r. 3.

2. Receivers.

Receivers—
Security by and
allowance to.

12. When an order is made directing a receiver to be appointed, the person to be appointed shall unless otherwise ordered, first give

security, to be approved by the Court or Justice and taken before the Registrar or a commissioner for affidavits, duly to account for what he shall receive as such receiver, and to pay the same as the Court or Justice shall direct; and the person so to be appointed shall, unless otherwise ordered, be allowed a proper salary or allowance.

Form of
security.
Ct., E. Or. 50,
r. 16.

As to appointment of receiver on application at Chambers, see *Jud. Act*, sec. 16; as to duty of receiver or manager in possession of property in managing and dealing therewith, see *H.C.P. Act*, sec. 29; as to liability of receiver or manager to be sued without leave of the Court, *ib.*, sec. 30; as to time for application for appointment, see r. 7, *supra*; as to security generally, see Or. 25.

Under the *Judicature Act* as adopted in several of the States, and under sec. 16 (1) of the *Equity Act* 1901 (N.S.W.), a receiver may be appointed by interlocutory order in all cases in which it appears to the Court to be just or convenient that an order should be made.

As to the practice in New South Wales with respect to receivers generally, see *Rich, Newham and Harvey, Practice in Equity*, pp. 16, 19, 20.

As regards execution the judgments of the High Court may be enforced in in the States by the same remedies as are allowed in like cases in the Supreme Courts of the States; *H.C.P. Act*, sec. 26.

In an application for the appointment of a receiver, the Judge before whom the application is made, may have regard to the amount of the debt claimed, the amount which may probably be obtained by the receiver, and the probable costs of his appointment, in arriving at a conclusion whether it is "just or convenient" that the order should be made; *Sandford v. King*, 26 V.L.R., 387.

It is just and convenient to appoint a receiver to receive a judgment debtor's interest in an intestate estate, even before administration, in order to deprive the judgment debtor of the opportunity of making away with his interest in the estate; *Bank of Australasia v. Whitehead*, 24 V.L.R., 308.

In New South Wales the Court of Equity will not appoint a receiver of an equitable execution where the judgment creditor can issue execution against such interest at law under 5 Vic., No. 9, sec. 31; *Henry Bull & Co. v. Murphy*, 21 N.S.W.L.R. (E.), 1. Before granting equitable execution the Court must be satisfied that the plaintiff has tried all he can to get satisfaction at law, and that means that he must do all he can in Victoria to get satisfaction of his judgment; *Ettershank v. Russell*, 6 A.L.T., 140. Where the applicant for a receiver states in his affidavit that he has made inquiries and can find no legal assets to satisfy the judgment debt, he has satisfied the onus which is on him, of showing that he has exhausted all legal remedies to recover his judgment, and under such circumstances it is not necessary for him to have taken out a writ of *fi. fa.*; *Bank of Australasia v. Whitehead*, 24 V.L.R., 308. In New South Wales the Court of Equity can appoint a judgment creditor as receiver of a sum of money in the Equity Court payable to the judgment debtor; *Church v. Arnold*, (1902), S.R. (Eq.) (N.S.W.), 127. In an action for the winding up of a partnership an interim injunction was granted to restrain the disposal of assets of the partnership by one partner, and the person threatening to dispose of the assets and a third person were appointed joint receivers; *Shanks v. Shanks* (1902), Q.W.N., 59. When the

purchaser of certain real estate delayed registration of the transfer with the view of defeating the right of his judgment creditor to execution against the land, a receiver was appointed to receive the rents and profits of the land, without prejudice to the rights of any prior encumbrances; *Mosman v. Sachs*, 2 Q.L.J., 57.

In an action for dissolution of partnership, it being shown on the *ex parte* application of the plaintiff before appearance was entered that the circumstances were urgent, an interim receiver was appointed for fourteen days, with leave to give notice of motion for the appointment of a receiver until the hearing of the action, the plaintiff undertaking to abide by any order which the Court might make as to damages or otherwise; *Groves v. Matheu*, 8 Q.L.J. (N.C.), 58.

On the application for the appointment of a receiver, evidence as to the personal fitness of the proposed receiver, and of his willingness to act, should be given; *Fleming v. Booth*, 1 S.C.R. (Q.), 32.

An application to the Court by the receiver of a firm for leave to commence an action may be made *ex parte*; *Dyson v. Jack*, 16 A.L.T., 1.

The Court has power to grant leave to serve notice of motion for the appointment of a receiver upon the defendant out of the jurisdiction where the judgment in the action had been regularly obtained within the jurisdiction, and the defendant had been personally served with the writ within the jurisdiction, and where the property in respect of which a receivership is asked for is also within the jurisdiction; *English Scottish &c. Bank v. Hoban*, 24 V.L.R., 451.

Where money has been deposited in a bank by a receiver appointed by the Court in an action, this does not constitute such money Crown money so as to entitle the Crown to priority over the other creditors of the bank in winding up proceedings. The appointment of a receiver does not change the occupation of the estate, but by it a mode of management is directed by the Court through its officer as a common agent for all parties to the litigation; *McMeckan v. Aitken*, 17 A.L.T., 27; see also *Queen v. Bank of Victoria*, 17 A.L.T., 18.

Where receiver appointed in Court.

Adjournment into Chambers to give security.
E. Or. 50, r. 17.

13. When a judgment or order is pronounced or made in Court by which a person therein named is appointed to be receiver, the Court may adjourn the cause or matter to Chambers, in order that the person named as receiver may give security as in the last preceding Rule mentioned, and may thereupon direct such judgment or order to be drawn up.

3. Stop Orders.

Order to prevent transfer or payment without notice to applicant.
Ct., E. Or. 46, r. 12.

14. Any person claiming to be entitled to or to have a charge upon any moneys or securities standing to the credit of a cause or matter in Court may apply to the Court or a Justice for an order to prevent the payment or transfer thereof to any person without notice to him.

As to history of stop orders, see *Chadwick v. Bennett*, 4 V.L.R. (E.), 227. As to who may obtain stop orders, see *Ware v. Ware*, 1 V.R. (E.), 1; *Chadwick v. Bennett*, *supra*; *Green v. Sutherland*, 6 V.L.R. (E.), 1; as to practice with respect to stop orders, see *Lloyd v. Barbat* (1903), S.R. (Q.), 86.

15. Notice of the application must be given to the persons interested in such parts of the moneys or securities as are sought to be affected by the order asked for, but need not be given to the parties to the cause or matter or any other persons, unless they are so interested.

Mode of application.
Cf., E. Or. 46, r. 13.

As to procedure by summons, see Or. 40 ; as to service generally, see Or. 47.

16. The costs of and occasioned by any such application or order shall be in the discretion of the Court or Justice.

Costs.
Cf., E. Or. 46, r. 12.

As to jurisdiction to award costs, see *Jud. Act*, sec. 26 ; as to appeal not allowed without leave from a decision with respect to costs, *ib.*, sec. 27 ; as to costs generally, see Or. 46.

ORDER XXXVIII.

STAYING PROCEEDINGS.

1. The Court or a Justice may, at any time after the institution of any cause or matter, direct a stay of proceedings, either as to the whole cause or matter, or as to any proceedings therein, or as to any proceedings under a judgment or order given or made therein.

General authority to stay.
Q. Or. 60, r. 1.

As to staying proceedings pending the giving security for costs, see Or. 25, r. 14 ; as to summons not operating as a stay of proceedings, unless stay included therein, see Or. 40, r. 6 ; as to stay of proceedings pending an appeal, see H.C.P. Act, sec. 38 ; Rules of Court, Part II., sec. I., r. 25 ; *ib.*, sec. IV., r. 19.

ABSENCE OF PARTY.—Proceedings in an action will not be stayed for a time on the ground that the defendant will be absent from the colony ; *James v. Parry*, 3 A.L.R. (C.N.), 17.

DEFECT OF PARTIES.—A defect of parties, although usually a matter of amendment merely, may constitute a ground for summarily staying an action where the Court is satisfied that by no possible amendment can the plaintiff add parties against whom the action would be maintainable ; *Merry v. Fraser*, 5 A.L.R., 5.

2. An application to stay proceedings on the ground that there is no reasonable or probable cause of action or suit, or that the action or suit or proceeding is vexatious and oppressive, or is an abuse of the procedure of the Court, may be made at any time, and whether the plaintiff does or does not admit the allegations of fact, if any, on which the application is founded.

Stay of proceedings on ground of abuse of procedure.
Q. Or. 60, r. 2.

As to striking out pleadings, see Or. 14, rr. 30, 31.

INHERENT JURISDICTION.—The Court has inherent jurisdiction to stay proceedings which are vexatious or oppressive ; *O'Connor v. Pitcairn*, 27 V.L.R., at p. 54 ; *McBride v. Commissioner for Railways*, Queensland Dig., col. 215. " Every Court has a discretionary control over its own proceedings, and can restrain any abuse of them," *per* Griffith, C.J., *Carroll v. Jensen*, 10 Q.L.J., 61. Griffith, C.J., held that a Judge has power to stay proceedings under a previous

order in an action if justice cannot otherwise be done, and accordingly stayed proceedings under a former order; *Purcell v. Meston*, 5 Q.L.J., 118.

FORMER ACTION.—Where the subject-matter of an action, even if not strictly *res judicata*, has been so dealt with in former actions that, under the circumstances, it would be inequitable to allow it to be again raised, the Court, in the exercise of its inherent jurisdiction to prevent oppression, will stay the action; *Merry v. Fraser*, 5 A.L.R., 5.

SECOND ACTION OUT OF JURISDICTION.—It is not *prima facie* vexatious of a plaintiff to commence an action here for the same cause for which there is an action pending in England; *Hollander v. McQuade*, 12 W.N. (N.S.W.), 154.

G. M. & Co. commenced an action in New South Wales seeking foreclosure: the defendant in that action subsequently commenced proceedings in Victoria seeking an account and an injunction restraining G. M. & Co. from proceeding with the litigation in New South Wales. On an application for an order directing that the New South Wales action should not be gone on with, it was held that the balance of convenience was in favour of the action being tried in Sydney, and the application was dismissed with costs; *Osborne v. Goldsborough Mort & Co.*, 4 A.L.R. (C.N.), 85.

ELECTION OF JURISDICTION.—Where two actions are pending between the same parties in respect of the same cause of action, one in the Supreme Court, and the other in the County Court, the plaintiff will not be allowed to elect which action should continue, but the Court will decide the matter on a consideration of all the circumstances; *O'Connor v. Pitcairn*, 27 V.L.R., 53.

COMPROMISE OF ACTION.—Proceedings in an action were stayed on an agreement to compromise made by the solicitors on behalf of the parties; *South Australian L. M. & A. Co. v. McInnes*, Queensland Dig., col. 215; cf., also *Sraia v. Reynolds*, 21 V.L.R., 150. In *Vale v. Vale*, 5 A.L.R. (C.N.), 65, an application was granted directing a stay of the action, and direction made that the plaintiff execute and carry out an agreement of compromise. In Victoria it has been held that under sec. 62 (7) of the *Supreme Court 1890* (cf., *Jud. Act*, sec. 32), that Court had jurisdiction to make an order directing a plaintiff to carry out an agreement of compromise; *Hyde v. Grieve*, 19 V.L.R., 27. A stay of proceedings on the application of the defendant was refused where, after a settlement had been arrived at, the defendant's attorney entered an appearance, and the plaintiffs filed their declaration; *Watkins v. Fairfax*, 1 W.N. (N.S.W.), 128.

As to English practice generally, see A.P., vol. II. (1904), 422.

Stay of
proceedings.
Q. Or. 60, r. 3.

3. The Court or a Justice may stay the proceedings in any cause or matter improperly instituted in the name of any person by a next friend.

As to proceedings in the name of an infant or person of unsound mind by his next friend, see Or. 2, rr. 12, 14, 15.

Withdrawing
juror.
Q. Or. 60, r. 4.

4. When at the trial of a cause before a Justice with a jury a juror is withdrawn with the consent of the parties, the withdrawal shall have the effect of an order by consent for the staying of all proceedings in the cause or matter, except so far as the Court at the time of the withdrawal, and with the consent of the parties otherwise orders.

5. When an action is discontinued or dismissed for want of prosecution, or judgment of nonsuit is entered, if, before payment of the costs, a subsequent action is brought for the same, or substantially the same, cause of action, the Court or a Justice may order that proceedings in the subsequent action shall be stayed until such costs have been paid.

Staying action until costs paid.
Q. Or. 60, r. 5.
Ct., E. Or. 26, r. 4.

As to giving security for costs when a second action is brought for the same cause of action, see Or. 25, r. 10.

Where a plaintiff, having failed in one action brings a second action for the same cause of action, the second action must be stayed until the costs in the first have been paid ; *Kesterton v. Paroo D.B.*, Queensland Dig., col. 215 ; *Dobbyn v. Dobbyn*, 7 Q.L.J. (N.C.), 6 ; *Timoney v. Stott*, 12 W.N. (N.S.W.), 127 ; *Contest v. Croxton*, 12 W.N. (N.S.W.), 128 ; *Rheuben v. Ryan*, 10 W.N. (N.S.W.), 196. A stay of proceedings in a Supreme Court action was ordered where a plaintiff brought an action in the District Court arising out of the same subject-matter and failed to pay the costs to the defendant, who recovered a verdict, until the costs of the District Court action were paid ; *Murphy v. Horan*, 2 W.N. (N.S.W.), 6 ; *Ringduhl v. Brouner*, 7 W.N. (N.S.W.), 55.

Where a plaintiff failed in an action brought to recover damages for the dishonour of his cheque, and brought another action against the same defendants for false representation in respect of the same cheque, the second action was stayed until the costs of the first were paid ; *De Plevitz v. The A.J.S. Bank*, 19 W.N. (N.S.W.), 251. An action was brought by an infant by a next friend. The plaintiff was nonsuited. The plaintiff then brought another action for the same cause by a different next friend. A stay of the second action until the costs of the first were paid was refused ; *King v. The Kauri Timber Co. Ltd.*, 19 W.N. (N.S.W.), 280.

Where the defendant obtained a new trial on the ground that the verdict was against evidence, and the plaintiff was ordered to pay the costs of the new trial motion, Stephens, J., in Chambers, refused to stay the proceedings in the second action, on the ground that the costs of the new trial motion had not been paid, as it was not shown that the plaintiff was acting vexatiously ; *Wood v. McMahon*, 8 W.N. (N.S.W.), 12.

ORDER XXXIX.

CONSOLIDATION.

1. Causes or matters in the Court may be consolidated by order of the Court or a Justice if it appears that substantially the same question is involved in all the causes or matters, or that the decision in one cause or matter will determine the others. The application may be made by any person who is a party to two or more of the causes or matters.

Consolidation of causes or matters.
Ct., E. Or. 49, r. 8.

As to payment into Court in consolidated action, see Or. 18, r. 7 ; as to consolidation when proceedings by information of *quo warranto*, see Or. 41, r. 39.

An application to consolidate two actions for malicious prosecution by the same plaintiff against the same defendant was refused, the transactions being so distinct as to justify separate trials; *Williams v. Union Bank of Australia*, Queensland Dig., col. 201. Consolidation of suits for divorce was ordered in *Lance v. Lance*, 19 W.N. (N.S.W.), 33.

CONSOLIDATION.—Two persons, A. and C., members of a land syndicate, brought actions, each on his own behalf, against the same defendants, with reference to a contract for the sale of land. A third person, B., afterwards commenced an action on behalf of himself and all the other members of the syndicate against the same defendants. This third action was commenced in pursuance of a resolution arrived at by the majority of the members of the syndicate. Subsequently each of the first two plaintiffs amended his action by suing on behalf of himself and all the other members of the syndicate. The action in which B. was plaintiff had proceeded further than the other actions, and was set down for trial. Upon application by the defendants to have the actions consolidated, or that two should be stayed pending the trial of the third: *Held*, that the action of B. and others should proceed, and that the first two actions should be stayed; *Ballantyne v. Raphael*, 15 V.L.R., 267.

A. commenced an action against a bank for an account and for an injunction restraining the bank from registering certain mortgages given by B. to the bank. Subsequently the bank issued two writs, both specially endorsed, against A., one for principal and interest under a guarantee given by A. to secure B.'s indebtedness to the bank, and the other for money lent and money paid. A. claimed a consolidation of the three actions, and the bank claimed final judgment. *Held*, that final judgment should be granted, but execution stayed until the trial of the action brought by A. against the bank; *Thwaites v. Bank of Australasia*, 1 A.L.R., 21.

ORDER XL

CHAMBERS.

1. *Jurisdiction in Chambers.*

General
jurisdiction.
Cl., Q. Or. 65,
r. 1.
Cl., E. Or. 55, r.
2.

1. The following matters may be heard and determined by a Justice in Chambers, that is to say :—

- (1) Any application which by any Act or by Rules of Court is authorized to be made to a Justice, and is not specifically required to be made to a Justice in Court;
- (2) Applications for payment or transfer to any person of any money or securities standing to the credit of any cause or matter where there has been a judgment or order declaring the rights of the applicant, or where the title of the applicant depends only upon proof of the identity, or of the birth, marriage, or death, of particular persons;
- (3) Applications for payment or transfer to any person of any money or securities standing to the credit of a cause or matter, when the nominal amount or value of either

the money or the securities proposed to be dealt with does not exceed £500, exclusive of interest ;

- (4) Applications for payment to any person of the interest or dividends on any money or securities standing to the credit of a cause or matter, whether to a separate account or otherwise ;
- (5) Applications relating to the investment or disposition of money or securities in Court ;
- (6) Applications for orders on the further consideration of any cause or matter, when the order to be made is for the distribution of any fund or property ;
- (7) Applications in a cause or matter for or relating to the sale of property by auction or private contract, and as to the manner in which the sale is to be conducted, and for payment into Court and investment of the purchase money ;
- (8) Applications for directions as to the management of any property under the control of the Court.

As to cases in which the jurisdiction of High Court may be exercised by a Justice in Chambers, see *Jud. Act*, sec. 16 ; as to Chamber jurisdiction vested in State Supreme Court in a matter pending in the High Court, *ib.*, sec. 17 ; as to jurisdiction of Justice sitting in Chambers to award costs, *ib.*, sec. 26 ; as to there being no appeal as to decision of a Justice in Chambers with respect to costs, except by leave of the Justice, *ib.*, sec. 27 ; as to appeal from a decision of a Justice in Chambers, *ib.*, sec. 34 ; as to applications for payment or transfer of money or securities out of Court, see r. 3, *infra* ; as to further consideration, see Or. 30, r. 22 ; as to the power of a Justice to review his own order in Chambers before it is taken out, see *Woods v. Sheriff of Queensland*, 6 Q.L.J., 163 ; *Alfred Shaw & Co. v. Drake & Stubbs*, 8 Q.L.J., at p. 14 ; *In re Kinsey* (1903), Q.W.N., 68.

Objections dealt with in Chambers, such as refusal to strike out a paragraph in a statement of claim, may under certain circumstances be again raised before the Court ; *M'Auley v. Beatty*, 8 A.L.T., 66.

The Victorian Order 54, r. 10, providing that the business to be disposed of in Chambers shall consist of "such other matters as the Judge may think fit to dispose of at Chambers," applies only to matters as to which no other rule expressly provides ; *Williams v. Burden*, 18 V.L.R., 488.

Where the defendants applied on summons for further and better particulars and the application was refused, it was held that they were not estopped by the adjudication under the first summons from obtaining particulars under a second summons ; *Wareham v. McLean Bros. & Rigg Ltd.*, 25 V.L.R., 664.

2. Procedure in General.

Applications to be made by summons unless *ex parte*.

Ct., E. Or. 54, r. 1.

2. Every application made to a Justice in Chambers shall, except as hereinafter mentioned, be made by summons, signed by a Justice or the Registrar or other proper officer, and sealed with the office seal. The summons must be served on the opposite party.

As to *ex parte* applications in general, see r. 4, *infra*; as to signing and sealing of summons, compare H.C.P. Act, sec. 4, and note thereon; as to service of summons, see r. 5, *infra*; on hearing of summons, evidence may be by affidavit, see H.C.P. Act, sec. 20. The fee on sealing an originating summons, a summons for directions, and any other summons, is 5s.

CHAMBERS.—In Victoria where a summons has been taken out by the plaintiff returnable before one Judge, and, at the request of the defendant, it is referred to another Judge, such summons can only be gone into before the Judge to whom it is referred upon notice to the other side; *Rismondo v. Rismondo*, 7 A.L.T., 128.

Certain *ex parte* applications to be by summons. Cf., E. Or. 54, r. 2.

Ex parte applications in general. Cf., E. Or. 54, r. 2.

3. Every application for payment or transfer of money or securities out of Court made *ex parte* shall be made by summons.

4. Other *ex parte* applications in a pending cause or matter, and applications for orders nisi, may be made without summons. But the Justice may upon any application made *ex parte*, require a summons to be taken out, or a memorandum of the order asked for to be filed.

As to appeals from refusal of *ex parte* applications, see Part II., Appeal Rules, sec. 1, r. 6.

Service of summons. Cf., E. Or. 54, r. 4 E.

5. Every summons shall be served two clear days before the return day thereof, unless the Court or a Justice allows a shorter period of service.

Provided that a summons for time only may be served on the day previous to the return thereof, and that a summons signed by a Justice may be made returnable at any time.

As to service of proceedings generally, see Or. 47; as to what days are reckoned in computing the time for service, see Or. 45.

No stay unless so ordered by a Justice. Q. Or. 65, r. 8.

6. A summons shall not operate as a stay of proceedings unless a stay is included therein by order of a Justice.

As to stay of proceedings generally, see Or. 38.

What matters to be included in the same summons. Cf., E. Or. 54, r. 9.

7. Any party making an application at Chambers in a cause or matter may include in one and the same summons all matters upon which he then desires the order or directions of the Justice in the cause or matter; and upon the hearing of the summons the Justice may make any such order, and give any such directions, relative to or consequential on the matter of the application, as are just.

As to summons for directions, see Or. 12.

CHAMBERS.—Where a plaintiff has taken out a summons which contains a specific application to which is added the general terms “or such other order as to the Judge may seem just,” the other party is justified in appearing on the return of such summons, though he makes no objection to the granting of the specific application made on such return, and he will be allowed his costs of so appearing because, under the last part of the summons, the party taking it out might have asked for anything, *e.g.*, that the defendant should take short notice of trial; *Henelton v. Crozier*, 6 A.L.T., 222.

8. Any application may, if the Justice thinks fit, be adjourned from Chambers into Court.

Adjournment to Court or Chambers.
Ct., E. Or. 54, r. 9.

Any application made in Court which might have been made at Chambers may be adjourned from Court into Chambers.

ORDER XLI.

CERTIORARI: MANDAMUS: PROHIBITION: QUO WARRANTO: WRIT OF ASSISTANCE.

1. General.

1. Applications for writs of Certiorari, Mandamus, or Prohibition, or for leave to exhibit informations of Quo Warranto, or for relief of like nature to Mandamus or Quo Warranto, may be made to the Court or a Justice. The application shall be, in the first instance, for an order calling on the parties interested in resisting the application to show cause why the writ should not be issued, or the information filed, or other relief given, except in the case of applications by a Crown Law Officer *ex officio* for a writ of Certiorari or leave to file an information of Quo Warranto, in which case the order shall, if asked, be absolute in the first instance: Provided that the Court or Justice may in its or his discretion, in any case in which it appears necessary for the advancement of justice, grant an order absolute in the first instance for a writ of Certiorari, Mandamus, or Prohibition.

Application, how made.
Q. Or. 81, r. 1.

The fee on sealing a writ of mandamus, certiorari, habeas corpus, or prohibition is £1.

2. Orders to show cause shall be to show cause before a Full Court, unless the matter appears to be one of urgency, in which case the Court or Justice may make the order returnable before a single Justice in Court or Chambers.

Order to be returnable before Full Court.
Q. Or. 81, r. 2.

3. Affidavits intended to be used on the application shall be entitled “In the High Court of Australia,” without any other title.

Title of affidavits.
Q. Or. 81, r. 3.

As to affidavits generally, see Or. 32.

4. The order to show cause and all subsequent proceedings shall be entitled “The King against” the judicial or other authority or

Title of proceedings.
Q. Or. 81, r. 4.

other person to whom the writ is proposed to be directed, or against whom the information is proposed to be exhibited, "*Ex parte*" the applicant.

In the case of a writ of Certiorari, Mandamus, or Prohibition, which is proposed to be directed to a judicial or public authority, the authority shall be described by his or their name of office, and, in the case of justices in a court of summary jurisdiction, they shall be described as the justices at the place where the court is held.

The applicant shall, in the case of applications for writs of Mandamus or relief of like nature, and of applications for writs of Prohibition, be called the prosecutor, and, in the case of applications for informations of Quo Warranto or relief of like nature, the relator.

Order absolute.
Q. Or. 81, r. 5.

5. An order absolute need not be served, but the costs of service thereof may be allowed in the discretion of the taxing officer, if the writ is not actually issued or the information is not actually exhibited.

Costs.
Q. Or. 81, r. 6.

6. When the order is made absolute the Court or a Justice may, except as otherwise provided by these Rules, dispose of the costs of the proceedings either by the final judgment or by a separate order.

2. *Certiorari*.

Time and notice.
Q. Or. 81, r. 7.

7. An order nisi for a writ of Certiorari to remove a judgment, order, or other proceeding of an inferior Court or tribunal, or of justices, shall not be granted unless it is made within six months after the date of the judgment, order, or other proceeding, nor unless it is proved upon affidavit that the applicant has given six days' notice of the intended application to the Court, justice, or other person or persons by or before whom the judgment, order, or other proceeding was made or taken, or to two of them if more than one.

As to computation of the time limited by this rule in respect of notice of application, see Or. 45; the term month means "calendar month," see *Act Interpretation Act 1901*, sec. 22 (b).

OBJECT OF WRIT.—The object of granting a *certiorari* is that the Court may exercise a control over Courts of inferior jurisdiction. *Certiorari* is granted for two reasons: one is for preventing the bounds of the jurisdiction of an inferior Court being exceeded; and the other is for correcting defects upon the face of the proceedings. In some cases *certiorari* for correcting technical defects on the face of the proceedings is taken away by Statute. Where no such Statute has been passed the Court will grant the writ where irregularities appear on the face of the proceedings; *In re Harley*, 13 A.L.T., 160.

OF RIGHT.—"It has been contended that *certiorari* is not a writ of right. That is so in one sense, but the rule is that if the person asking for a *certiorari*—

that is to say, complaining that an inferior Court has acted without jurisdiction—is a person specially aggrieved, it is a matter of right. If he is not it is in the discretion of the Court to grant or refuse it; *per Griffith, C.J., The Queen v. Tilston*, 8 Q.L.J., at p. 10.

WHEN GRANTED.—The writ of *certiorari* is limited to cases in which an inferior Court or body possessing judicial or quasi-judicial powers has acted without jurisdiction or in a manner contrary to law for which no other convenient remedy is available; *Reg. v. Maude, ex parte Ryan*, 14 V.L.R., 227. Where an appeal lies *certiorari* is not available unless the party who wishes to bring up the proceedings on *certiorari* can show that there has been a manifest and total want of jurisdiction or fraud; *Reg. v. Quinlan, ex parte Sampson*, 10 V.L.R. (L.), 102. A writ of *certiorari* was granted to bring up and quash an order made by a Court of Marine Inquiry on the ground that the Court refused to allow the captain to give evidence on oath on his own behalf, the rule being that where the writ of *certiorari* has not been taken away by Statute it may be granted either because there had been a total want of jurisdiction or an irregularity in the exercise of it; *In re Bell, ex parte The Marine Board of Victoria*, 18 V.L.R., 432. Where *certiorari* is not taken away it is open to the Court to deal with the evidence, and the Court may see if there was any evidence which would support the conviction, if the magistrates had jurisdiction, and if there is no such evidence, the Court should quash the conviction; *R. v. Hahn*, 3 W.A.L.R., 78. *Certiorari* lies to bring up and quash the proceedings of a Military Court, though under the *Military and Naval Discipline Act 1870*, the proceedings of such Court are lodged and recorded in the office of the Attorney-General; *Reg. v. Strutt, ex parte Johnson*, 4 A.J.R., 78. The Court granted a writ of *certiorari* to quash an order of justices convicting a person for driving scabby sheep into a clean district where the summons directed such person to appear at one place and the case was heard at another in his absence; *Reg. v. Drury, ex parte Cullen*, 4 A.J.R., 169. The Court will not remove by *certiorari* from an inferior Court a case properly triable there, merely because the Judges of the inferior Court differ in opinion as to the point of law involved; *Fox v. Ashwin*, 8 N.S.W.L.R., 392.

MINISTERIAL ACTS.—The writ of *certiorari* does not operate on persons whose duties are merely ministerial, or whose functions are to carry into execution powers delegated to them by law; hence it will not lie to bring up a regulation made by a Board of Education constituted by Statute where such regulation possesses none of the characteristics of a judicial proceeding; *Reg. v. Board of Education*, 2 A.J.R., 97. A writ of *certiorari* lies against justices acting in a judicial, but not against them acting in a ministerial capacity. A justice acts in a ministerial capacity when he commits an accused person for trial; *Reg. v. Nicholl*, 1 S.C.R. (Q.), 42.

ELECTORAL PROCEEDINGS.—The report of the Returning Officer as to the results of a poll under the *Licensing Act 1885* was held to be a judicial decision, and therefore could be brought up by *certiorari*; *Reg. v. Dobbie*, 9 A.L.T., 225. *Certiorari* does not lie in respect of the procedure of ratepayers and returning officers at a local option poll, as the local option poll is not a judicial proceeding, but an electoral option or choice by the ratepayers; prohibition is the appropriate remedy; *R. v. Kelly*, 3 Q.L.J., 153.

HOW AFFECTED BY STATUTE.—Where *certiorari* is said to be taken away by Statute the superior Court is not absolutely deprived of the power to issue the writ; its action is limited, but it can quash the order or judgment removed on the ground of manifest defect of jurisdiction in the tribunal that made the order or of manifest fraud in the party procuring it; *Colonial Bank v. Williams*, 5 A.J.R., 53; L.R., 5 Privy Council, 417. Cf. also *Hunter v. Sherwin*, 6 W.W. & A.R. (L.), 26, 32. In such a case the superior Court has no jurisdiction to consider the merits; *Reg. v. Cope*, 7 V.L.R. (L.), 337. In New South Wales it was held that where a person has been summarily convicted by a magistrate acting without jurisdiction, a *certiorari* will be granted to have the conviction removed to the Supreme Court for the purpose of motion being made to quash it, notwithstanding that the general right to *certiorari* is taken away by sec. 444 of 46 Vic., No. 17 (N.S.W.); *In re Keyes*, 5 N.S.W.L.R., 359. In Victoria sec. 203 of the *Licensing Act 1890* (No. 1111), provides—“No determination order or proceedings under Part II. of this Act shall be removed or removable by *certiorari* or otherwise into the Supreme Court for any want or alleged want of jurisdiction, or for any error of form or substance.” It was held that the effect of this section is to preclude the proceedings of a Licensing Court being reviewed by means of a writ of *certiorari*, although there has been a partial or total want of jurisdiction in the Licensing Court; *In re Biel*, 18 V.L.R., 456.

CONSTITUTION OF TRIBUNAL.—Where a Judge or justices adjudicate in a proceeding in which they are interested *certiorari* is the proper remedy; *Ex parte Scott*, 2 V.L.R. (L.), 70; *Molloy v. Gunn*, 2 W. & W. (L.), p. 76. *Certiorari* was granted to bring up and quash an order of justices dismissing a summons by a bench of magistrates, one of whom was disqualified on the ground of interest; *R. v. Tchorzewski*, 8 Q.L.J., 79. The writ lies where the tribunal has been improperly constituted, so that it has no jurisdiction; *R. v. Licensing Justices of Rockhampton*, 11 Q.L.J., 12.

CONDUCT OF PARTIES.—Delay on the part of the person entitled to a writ of *certiorari* is a ground for refusing the same; *Regina v. Boucman, ex parte Garrett*, 4 A.J.R., 177. The granting of a writ of *certiorari* is in the discretion of the Court, and even where a person is aggrieved he may have acted in such a way as to preclude his making an objection to jurisdiction. An appeal from an order of justices was heard in a District Court, and dismissed on the merits. A writ of *certiorari* was applied for, on the ground that one of the justices was an interested party; the fact of the appeal was suppressed at the application for the rule nisi. The writ was refused; *R. v. Castles*, 6 Q.L.J., 94.

Objections to be stated in order.
Q. Or. 81, r. 8.

8. Any mistake or omission in any judgment, order, or other proceeding, which is intended to be relied upon as a ground for quashing the judgment, order, or proceeding, shall be stated in the order nisi; otherwise an objection on account of the omission or mistake shall not be allowed.

Service.
Q. Or. 81, r. 9.

9. In the case of orders to show cause why a writ of *Certiorari* should not be issued addressed to justices in a court of summary jurisdiction, service of the order on the clerk of the court shall be sufficient.

As to service generally, see Or. 47.

10. A writ of Certiorari to remove a judgment or order of any Court or tribunal shall not be issued, except on the application of a Crown Law Officer, until the applicant has given security in the sum of Fifty pounds conditioned to prosecute the writ with effect at his own cost without delay, and to pay to the party in whose favour the judgment or order was given or made, in the event of its being confirmed, such costs, if any, as the Court shall order him to pay. Security for costs. Q. Or. 81, r. 10.

As to issue of an order absolute for *certiorari* in the first instance, at the request of a Crown Law officer, see r. 1, *supra*; as to security in general, see Or.

25. The fee on sealing a writ of *certiorari* is £1.

11. When cause is shown against an order nisi for a writ of Certiorari to bring up a judgment or order, the Court, if it directs the writ to issue, may by the same order direct that the judgment or order shall be quashed on return without further order; and in that case no security need be given as required by the last preceding Rule, and a memorandum to that effect shall be indorsed upon the writ by the officer by whom it is issued. Order to quash in first instance. Q. Or. 81, r. 11.

In any such case the judgment or order shall be quashed, upon being returned to the Court, without further order.

12. When cause is not shown against an order nisi for a writ of Certiorari to bring up a judgment or order, or when the order is absolute in the first instance, the applicant shall apply to the Court or a Justice for an order to quash the judgment or order. Such application shall be made upon notice to the parties interested in supporting the judgment or order. When no cause shown. Q. Or. 81, r. 12.

As to granting of an order absolute in first instance, see r. 1, *supra*.

3. *Mandamus.*

13. An order nisi for a writ of Mandamus or for relief of a like nature, shall not be granted except upon the application of some person who is interested in the relief sought, and the applicant must state by his own affidavit that the application is to be made at his instance as prosecutor. Prosecutor to be named. Q. Or. 81, r. 13.

As to orders and writs of mandamus, see *Jud. Act*, secs. 33, 38; Constitution, sec. 75 (v.)

The cases in which a writ of mandamus will be granted against an officer of the Commonwealth are cited on p. 118, *supra*. On page 132, *supra*, are quoted authorities dealing with orders or writs of mandamus commanding the performance of their duties by Courts. The following decisions deal with the general principles as to mandamus:—

CASES IN WHICH GRANTED.—The writ of mandamus has been granted in the cases following:—To a Clerk of a Court of Mines requiring him to issue a cer-

tificate of registration to a mining company; *Reg. v. Bartrop*, 6 W.W. & A'B. (L.), 84; to justices who refused to grant a pawnbroker's licence; *Ex parte Mendelshon*, 2 A.L.T., 45; *Ex parte Nyberg*, 4 A.L.T., 78; to a District Road Board to compel payment of the salary of a clerk who has been illegally dismissed from office; *Reg. v. Keilor District Road Board*, 1 A.J.R., 29; with which compare *Reg. v. Mayor of Footscray*, 3 W.W. & A'B. (L.), 9; *Reg. v. East Collingwood*, 1 W. & W. (L.), 1; *Smith v. Mayor of Clunes*, 5 W.W. & A'B. (L.), 86; to a municipality to compel payment of the remuneration of a municipal auditor; *Queen v. President of Shire of Winchelsea*, 22 V.L.R., 171; at the instance of the mortgagee of the rates to whom interest was due, to the individual members of a municipal council which neglected to strike a rate for the current year to compel them to strike a rate: *In re the Municipal District of Lambton*, 20 N.S.W.L.R., 378; 16 W.N. (N.S.W.), 75, 81; *Wilson v. President &c. Shire of Oakleigh*, 5 A.L.T., 195; to a Registration Court to place a claimant's name on an electoral roll; *R. v. Electoral Justices of Toombul*, 6 Q.L.J., 88; to the Registrar-General to register a person as a minister to celebrate marriages; *Ex parte Hay*, (1901), 1 S.R. (N.S.W.), 120; to a magistrate to take an information; *R. v. Macarthur*, 3 S.C.R. (Q.), 124; to the Colonial Treasurer for refusing to issue a publican's licence; *Ex parte Gibson*, 2 N.S.W.L.R., 203. The jurisdiction of the Full Court to grant a writ of mandamus is not ousted by the creation of a new and equally expeditious remedy; *R. v. Licensing Justices of North Brisbane*, 6 Q.L.J., 95. A mandamus will be granted to public bodies to compel them to perform their public duties, such as to open roads and keep them free from obstructions; and the existence of another legal remedy is no objection to the granting of the writ where such other remedy would be inadequate, too slow, or of a kind undesirable to be enforced; *In re Glenely Shire, ex parte Sealey*, 11 V.L.R., 64. On a quashing order on the ground of a defect in the constitution of the tribunal, the Court may grant a mandamus to enter adjournments and hear and determine the matter; *R. v. Licensing Justices of Rockhampton*, 11 Q.L.J., 12. A Warden having refused to hear a case and having ceased to act as Warden, on an application for a mandamus the Court ordered the mandamus to issue to the present Warden, and ordered the ex-warden to pay the costs; *Ex parte Dempsey*, 13 W.N. (N.S.W.), 83.

CASES IN WHICH REFUSED.—Mandamus has been refused in the following cases:—To a County Court Judge who has irregularly altered a judgment for one party to a judgment for the other to issue execution upon the original judgment, so long as the altered judgment remains on the record; *Ex parte McEwen*, 4 V.L.R. (L.), 9; to a Court of Mines Judge who has a statutory discretion to hear an appeal from a Warden or not; *Renwick v. Hyde*, 1 A.L.T., 77; to a Warden who refused to put parties in possession of a claim under a decree of a Court of Mines on the ground that there was a discrepancy between the decree and a map referred to in it; *In re Coglon, ex parte McDermott*, 2 W. & W. (L.), 139; to a Warden who refused to order possession of a claim because there was pending an application by a third party for a mining lease of the same ground, as the Warden having adjudicated, mandamus could not issue to compel him to complete his order; *Reg. v. Orme, ex parte Droscher*, 3 V.L.R. (L.), 343; to a Returning Officer to compel him to receive a nomination paper of a candidate and to hold an election on it; *Ex parte Attenborough, in re Bent*, 5 W.W. & A'B. (L.), 103; to a Returning Officer who was *functus officio* to compel him to declare a candidate duly elected; *Martin v. Robertson*, 15 A.L.T., 123; to a shire council to compel the calling of a

meeting to rescind a resolution; *Ex parte Knight, Reg. v. Howes*, 5 A.J.R., 107; to a board of health to compel it to approve of plans; *Reg. v. Central Board of Health, ex parte Wilson*, 15 V.L.R., 375; to a Public Service Board to compel them to classify an applicant in the clerical division where the applicant had been guilty of unreasonable delay; *In re Wall*, 16 V.L.R., 686; to a medical board to register a person with whose qualification they were dissatisfied, it being in their discretion; *Ex parte Speece*, 7 Q.L.J. (N.C.), 85; to a barristers board which had a discretion as to withholding its certificate, and the discretion had been legally exercised; *In re Broderick*, 1 W.A.L.R., 147; to a borough council where it has considered a matter, and in the exercise of its discretion under the *Dairies and Supervision Act* refused to register; *Ex parte Reed*, 6 W.N. (N.S.W.), 63. On the hearing of an affiliation summons, the magistrate having decided, at the request of the parties, before hearing on evidence that he had no jurisdiction to make a valid order against the father without the evidence of the mother: *Held*, that the magistrate had not declined to hear a case, but had given a wrong decision on the question of the evidence necessary to support an order for maintenance, and a mandamus to compel him to hear and determine the case was refused; *Ex parte Austen*, 18 N.S.W.L.R. (L.), 216.

On an application for a mandamus to compel a shire council to open a road both the owner and lessee of adjoining lands though not served with the rule *nisi* nor made parties to it are entitled to be heard; *In re Shire of East Loddon, ex parte Cheyne*, 24 V.L.R., 703. In exercising its discretion as to the issue of a mandamus the Court is entitled to look ahead and to consider the probable consequences of its act, and no mandamus should ever issue where the result will be barren or where the person commanded may disregard the command with impunity; *Ex parte Cheyne*, 24 V.L.R., 703. *In re O'Rourke*, 7 N.S.W.L.R., 64, it was held that a mandamus would not lie against an engineer-in-chief for railways to grant a certificate. Government contracts are on the same footing as contracts between private individuals. The Court is bound in the exercise of its discretion to refuse to grant a writ of mandamus in favour of a person having a strict legal right, when the granting of such writ will prove mischievous and be opposed to well-established policy; *Ex parte Wallace & Co.*, 13 L.R. (N.S.W.), 1; where the effect of a mandamus would have been to enable the applicant to profit by a fraud it was refused; *R. v. Medical Board of Queensland*, 7 Q.L.J., 122. See also *Ex parte Bouchier*, 13 N.S.W.L.R., 105.

AFFIDAVITS.—A mandamus to the Collector of Customs commanding him to sign a bill of entry as a warrant for the delivery of certain goods as free goods, was refused on the grounds that the affidavits did not clearly show a demand upon the proper officer to discharge a statutory duty, and did not show that the collector was the only officer who could sign the entry; *In re Gray*, 8 W.N. (N.S.W.), 84.

The unsuccessful applicant for a licensed victuallers licence obtained an order *nisi* for a mandamus to compel the licensing authority to whom he had applied to hear and determine his application on the ground that his application had not been judicially considered by them. On the return of the order *nisi*, the respondents read an affidavit by the chairman of the licensing bench by which it appeared that the appellant's application had been judicially heard and determined by the bench, and that their decision and order had been duly recorded in the depositions. The appellant asked leave to read further affidavits denying the

allegations contained in the respondent's affidavit. *Held*, that such leave should be refused; *R. v. King*, 9 Q.L.J., 99.

In New South Wales the affidavit in support of a rule *nisi* for a mandamus must distinctly state who are the parties making the application, so as to satisfy the Court that the application is made *bond fide*; *Ex parte Murray*, 19 W.N. (N.S.W.), 192.

FORM OF RULE NISI.—In New South Wales the rule *nisi* for a writ of mandamus should call upon the respondents to show cause why a writ of mandamus should not be issued, and not call upon them to show cause why they "should not be compelled by order of this Honourable Court," &c. A rule in the latter form in New South Wales cannot be amended so as to make it a rule for a writ of mandamus; *Ex parte Campbell*, 14 W.N. (N.S.W.), 144.

COSTS.—Where the opposition to a mandamus was unsuccessful as regards the issue of a writ, but where, upon a sufficient return to the writ, the Court was of opinion that the evidence in support of the conviction was sufficient and discharged the rule *nisi* to quash the return, the prosecutor was ordered to pay costs; *Reg. v. Pohlman, ex parte Bayshaw*, 1 V.L.R. (L.), 208. As a general rule where mandamus is granted, the costs also are granted, but the Court has a discretion which will be exercised against the applicant if he misleads the Court in material particulars; *Reg. v. Pohlman, re Cobb v. Munro*, 3 A.J.R., 109. The Court will for a sufficient reason withhold costs from a successful applicant but it will in general order costs to be paid by that party to the application who ultimately fails to the party who ultimately succeeds; *Reg. v. Bailes, ex parte Pickup*, 6 A.L.T., p. 29.

The general rule that the costs of a mandamus go to the successful party is subject to the exception that a judicial officer who is required to do an act is not made liable for costs unless he has been guilty of improper conduct. Costs were refused against a Court of Revision which was ordered by mandamus to hear objections to a person's name appearing on a ratepayers' roll; *Reg. v. Bailes, ex parte Pickup*, 6 A.L.T., 29; *Ex parte Alexander*, 8 A.L.T., 43. The costs of an application for a mandamus had under the old practice in Victoria, had to be made the subject of a separate application; *In re Glenelg Shire, ex parte Sealey*, 11 V.L.R., 64. It was held on application for a mandamus that the magistrate could not be ordered to pay costs because he had not acted perversely, and the respondent could not be ordered to pay the costs because the magistrate had acted upon his own initiative and not upon the application of the respondent; *Ex parte Vincent*, 16 W.N. (N.S.W.), 215.

Costs were given against justices on the hearing of an order *nisi* for mandamus where the Crown Solicitor had instructed counsel to appear on their behalf to show cause; *R. v. Electoral Justices of Toombul*, 6 Q.L.J., 88.

Where the relief granted by a mandamus could have been obtained by a special case, the costs were limited to those of a special case; *R. v. Licensing Justices of North Brisbane*, 6 Q.L.J., 95.

An appellant obtained an order *nisi* for a mandamus to compel the Queensland Medical Board to restore his name to the register of medical men for the State of Queensland. The order *nisi* did not ask for costs. Counsel for the board appeared to consent to the order being made absolute, but to object to the payment of costs. *Held* that the appellant being unable to maintain his mandamus without

appearing in Court was entitled to recover his costs of such appearance; *R. v. Queensland Medical Board, ex parte Forbes*, 11 Q.L.J., 8.

As to costs, see also r. 6, *supra*; r. 23, *infra*.

14. The Court or Justice may direct that the order nisi shall be addressed to, and served upon, any person who, in the opinion of the Court or Justice, ought to have notice thereof; and any person who, in the opinion of the Court or Justice, would be affected by the issue of the peremptory writ may show cause against the order nisi, and, if he does so, shall be liable to costs as if the order had been addressed to him.

Persons to show cause.
Q. Or. 81, r. 14.

APPEARANCE.—On an application for a mandamus to the Acting Chief Commissioner in Insolvency, he sent a written statement to the Registrar. The Court refused to have it read on the ground that he should have appeared in person or by counsel; *In re Beaumont*, 4 W.N. (N.S.W.), 66.

15. Unless otherwise ordered by the Court or Justice, every writ of Mandamus shall command the person to whom it is addressed to do the act in question, or show cause why he has not done it.

Form of writ.
Q. Or. 81, r. 15.

But the Court or Justice may direct that the command shall be peremptory in the first instance.

The fee payable on sealing a writ of mandamus is £1.

16. Unless otherwise ordered by the Court or Justice, the writ shall be returnable within the same time after service as is allowed for appearance in the case of a writ of summons.

Time for return of writ.
Q. Or. 81, r. 16.

As to return to writ, see r. 19, *infra*; as to peremptory writ, see rr. 22, 23; as to times allowed for appearance to a writ of summons, see Or. 4, r. 10.

17. When a writ of Mandamus is directed to one person only, the original writ must be personally served upon him by delivering it to him.

Service.
Q. Or. 81, r. 7.

When the writ is directed to two or more persons, it shall be personally served upon all of them but one in the manner prescribed for personal service of writ, and shall be served upon the remaining one by delivering the original writ to him.

As to personal service generally, see Or. 47; as to service of writ of summons, see Or. 7, r. 2.

18. When a writ of Mandamus is directed to justices or to a corporation, or to public authorities, it shall be served on so many of the justices or of the officers or members of the corporation or public authority as are competent to do the act commanded, unless by law some other mode of service is sufficient.

Service on justices or corporate bodies.
Q. Or. 81, r. 18.

19. The persons to whom a writ of Mandamus is directed shall, within the time allowed by the writ, file the writ in the Registry

Return.
Q. Or. 81, r. 19.

together with a certificate, written thereon or annexed thereto, and signed by them, setting forth that they have done the act commanded by the writ, or else setting forth the reason why they have not done so.

As to the time for the return, see r. 16, *supra*.

Service.

Q. Or. 81, r. 20.

20. A copy of the return shall be served upon the prosecutor on the same day on which it is filed.

Pleading to return.

Q. Or. 81, r. 21.

21. If the return does not certify that the act commanded has been done, the same proceedings shall be had and taken, and within the same time, as if the return were a defence in an action in which the prosecutor was the plaintiff and the person to whom the writ is directed was the defendant, and had pleaded the return as his defence.

Peremptory writ.

Q. Or. 81, r. 22.

22. If the questions of fact and law, if any, raised by the return are determined in favour of the prosecutor by judgment of the Court or otherwise, the prosecutor shall be entitled to a peremptory writ of Mandamus, commanding the persons to whom the first writ was directed to do the act therein commanded ; and such writ shall be awarded by the judgment, if any, or, if there is no judgment, by a separate order.

Where the rule *nisi* being defective in form was discharged, the Judge granted a rule *nisi* for a writ of mandamus returnable at once, and reserved the question of costs of the discharged rule ; *Ex parte Hay*, 15 W.N. (N.S.W.), 228.

Costs when peremptory writ awarded in first instance, or on obedience.

Q. Or. 81, r. 23.

23. When a peremptory writ is awarded in the first instance, the Court or Justice shall, at the time of granting the writ, direct by and to whom the costs of the proceedings shall be paid.

When a peremptory writ is not awarded in the first instance, and the return to the writ certifies that the person to whom it is addressed has done the act commanded by the writ, an application for an order for the costs of the proceedings may be made at any time after the return is filed, not being later than the fourth day of the Sittings of a Full Court held next after the day on which the return is filed.

The application shall be made to the Court or Justice by whom the writ was awarded.

Proceedings in nature of interpleader.

Q. Or. 81, r. 25.

24. When upon an application for a writ of Mandamus it appears that some person other than the prosecutor claims that the person to whom it is proposed to direct the writ shall do some act inconsistent with the act which the prosecutor claims to have done, the person to whom the order *nisi* or writ is directed may apply to the Court or a Justice for an order that the last-named person be substituted for him in all subsequent proceedings up to the issue of a peremptory writ of Mandamus ; and the Court or Justice may make such order on the application as is just.

25. An application for a writ of Mandamus, or an order in the nature of a mandamus, to a judicial tribunal to enter a minute of adjournment and hear a matter, shall be made within two months of the date of the refusal to hear, or within such further time as is, under special circumstances, allowed by the Court or Justice.

Time.
Q. Or. 81, r. 26.

The term "month" means "calendar month," see *Acts Interpretation Act* 1901, sec. 22 (b).

26. In any case in which the Court may direct the issue of a peremptory writ of Mandamus, the command may be expressed in an order of the Court without the issue of a writ, which order shall have the same effect as a peremptory writ of Mandamus.

Mandamus by
order.
Q. Or. 81, r. 27.

4. Prohibition.

27. The Court or Justice may in any case, instead of directing the issue of a writ of Prohibition, direct the prosecutor to deliver to the opposite party a statement of claim setting forth the facts upon which his claim to the writ is founded; and thereupon the same proceedings shall be had and taken in all respects as on a statement of claim in an action.

Pleadings in
Prohibition.
Q. Or. 81, r. 28.

As to writ of prohibition generally, see *Jud. Act*, sec. 33; *ib.*, sec. 38 (e); *Constitution*, sec. 75 (v.); as to application for writ, see rr. 1, 2; as to statement of claim, see Or. 16.

The authorities for requiring a Court to abstain from the exercise of a jurisdiction it does not possess and for prohibition generally are collected on p. 133, *supra*, and those dealing with writs of prohibition against public officers on p. 118, *supra*. The following cases on prohibition generally are cited in addition.

JURISDICTION TO GRANT WRIT.—"There is a great difference between the case of justices making a mistake in the exercise of their jurisdiction and the case of their having no jurisdiction at all. It is clearly settled by authority that if an inferior tribunal has jurisdiction, no mistake made in the exercise of that jurisdiction is a ground for prohibition. It is a ground for an appeal, if an appeal lies. If no appeal lies, then the only remedy is an application for a new trial;" *per Griffith, C.J., King v. The Justices of Rockhampton*, (1903) S.R. (Q.), 73.

The Supreme Court will not issue a prohibition to a Court of Mines where it has acted within its jurisdiction, although it may have decided wrongly; *Reg. v. Cope, ex parte Moore*, 4 A.J.R., 113.

Where there is no evidence of an element to constitute the offence with which a person has been charged prohibition will lie on the application of the person convicted; *Reg. v. Hare, ex parte Halford*, 7 A.L.T., 142. Where a Judge of the County Court had granted an application for a new trial more than seven days after the first trial, the Court granted a prohibition; *Reg. v. Skinner, ex parte Freame*, 3 A.J.R., 126. The Court will not issue a prohibition to the Registrar of a District Court. It is contrary to the dignity of the Supreme

Court to issue a writ of this high character against an inferior officer of an inferior Court; *Ex parte Martin*, 1 N.S.W.L.R., 345.

Quære, whether it is a ground for prohibition that a person has been punished to a less extent than is provided for by the Act under which the order is made; *Ex parte Ridley*, 20 W.N. (N.S.W.), 203. Prohibition will not lie to restrain an irregular execution upon a regular judgment of a District Court: *Bernstein v. Lynch*, 15 W.N. (N.S.W.), 129; nor to a Mining Registrar, as he is not a Court; *Ex parte King*, 15 W.N. (N.S.W.), 29. A rule *nisi* for a prohibition was made absolute on a point not taken in the Court below, or on obtaining the rule *nisi* where the point was patent on the face of the proceedings; *Ex parte Connell*, 14 W.N. (N.S.W.), 103.

PARTIAL PROHIBITION.—Where an inferior tribunal is about to enter upon an inquiry as to matters, some of which are within its jurisdiction, and some of which are without its jurisdiction, the Court will grant a prohibition to prevent it entering upon an inquiry as to latter; *Ex parte Smith*, 15 W.N. (N.S.W.), 12. Where an order of a Court of Mines made upon appeal from a Warden was bad as to costs only, it was held that that portion of the order relating to costs was severable, and that a prohibition should be granted as to that portion only; *Coates v. New Loch Fyne G.M. Co.*, 26 V.L.R., 117.

DELAY.—Where a garnishee order *nisi* was served on a Railway Commissioner on 1st April, and was made absolute on the 7th April, and the Commissioners did not obtain an order *nisi* for a prohibition until 26th July of the same year, and no explanation was given explaining the delay in obtaining such order, the Court in the exercise of its discretion refused to interpose, and the order *nisi* for a prohibition was discharged; *Mayor of Bendigo &c. v. Craven, ex parte The Victorian Railways Commissioner*, 24 V.L.R., 173.

Semble, on an application for a common law prohibition, the question of delay may be immaterial if the objection to the jurisdiction is one that goes to the subject-matter of the proceeding, and is not of a personal nature; *Ex parte Howison*, 20 W.N. (N.S.W.), 232.

AFFIDAVITS.—Where there is conflicting evidence on the affidavits as to the ruling of a magistrate the Court will not consider the affidavits on one side or the other; *Ex parte Mumby*, 15 W.N. (N.S.W.), 209; as to whether on an application against a magistrate he should make an affidavit, see *Ex parte Hales*, 19 N.S.W.L.R., 378; *Ex parte Lucas*, 16 W.N. (N.S.W.), 51; as to nature of the affidavits required in New South Wales on an application for a statutory prohibition, see *Ex parte Travers*, 19 W.N. (N.S.W.), 298; *Ex parte Ah Fal*, 20 W.N. (N.S.W.), 153. Cf. also, *Ex parte Ah Poy*, 20 W.N. (N.S.W.), 184; *Ex parte Weingarth*, 20 W.N. (N.S.W.), 136.

FORM OF RULE.—The rule *nisi* in New South Wales should call upon the respondents to show cause "why a writ of prohibition should not issue," and not call upon them to show cause "why they should not be prohibited and restrained." The Court refused to amend a rule in the latter form; *Ex parte McDonald*, 15 W.N. (N.S.W.), 32. A rule for a prohibition under sec. 12 of 14 Vic., No. 45 (N.S.W.) should call upon the justices to show cause why a prohibition should not issue. Where the rule only called upon the prosecutor to show cause the Court refused to amend it, and discharged it with costs, *Ex parte Wilmoughby*.

14 W.N. (N.S.W.), 125. A rule *nisi* for a prohibition on the ground that the decision complained of is against natural justice, without more, is bad for not stating sufficiently the grounds, and an application to amend and amplify was refused; *Ex parte Wrigley*, 20 W.N. (N.S.W.), 71.

SERVICE.—In New South Wales it was held that where the Crown is interested in a penalty notice of a rule *nisi* for a prohibition should be given to the Attorney-General; *Ex parte Ryan*, 20 N.S.W.L.R., 274. A rule *nisi* to an inferior Court in New South Wales should be served on the Court. A rule *nisi* for a prohibition to the District Court should be served on the Registrar; *Ex parte Burt*, 18 W.N. (N.S.W.), 289. Appearance to obtain an adjournment of a rule *nisi* for a prohibition operates as a waiver of any objection to the regularity of service of the rule, but not of an objection to the form of proceedings; *Ex parte Campbell*, 19 W.N. (N.S.W.), 68. An enlargement of a rule *nisi* was made in *Ex parte Brown*, 20 W.N. (N.S.W.), 245.

RULE RETURNABLE INSTANTER.—A rule *nisi* for a prohibition having been discharged, with costs, on technical grounds, the Court granted a fresh rule returnable at once; *Ex parte Moate*, 15 N.S.W.L.R., 83; *Ex parte Workman*, 12 W.N. (N.S.W.), 23; *Ex parte Dempsey*, 13 W.N. (N.S.W.), 43.

COSTS.—Costs will not be awarded against justices on the granting of a rule absolute where they have not been asked for in the rule *nisi*; *Ex parte Keyse*, 1 S.C.R. (Q.), 117; *Brennan v. Williams*, 9 Q.L.J., 90. See also, *Ex parte Cox*, 12 W.N. (N.S.W.), 172; *In re Starr*, *ib.*; *ex parte Rebello*, 10 W.N. (N.S.W.), 60; *R. v. Smith*, *ib.*, 171; *Ex parte Burnett*, *ib.*, 131. Where magistrates retain counsel to support a conviction after the Attorney-General has advised that the conviction cannot be sustained, and a writ is granted, they are liable for costs; *R v. Wilson*, 1 S.C.R. (Q.), 12. In granting a prohibition the Court will not give costs against justices, although evidence has been wrongly rejected, unless there is a clear case of misconduct; *Ex parte Tranter*, 7 S.C.R. (N.S.W.), 213; *Kinchler v. Cooper*, 2 S.C.R. (N.S.W.), 142. The cases considered in which costs may be awarded against a magistrate, see *Ex parte Cox*, 12 W.N. (N.S.W.), 179; *In re Starr*, *ib.* Where the objection to jurisdiction was not taken before the magistrate the prohibition was granted without costs; *Ex parte Clarke*, 7 S.C.R. (N.S.W.), 146.

Where a magistrate heard a summons a week before the proper return day it was held that the respondent must pay the applicant's costs, and that the magistrate must pay his own; *Ex parte Maguire*, 19 W.N. (N.S.W.), 157. Costs were refused to an applicant on the ground that the information was laid by a constable in the discharge of his duty; *Ex parte Campbell*, 19 W.N. (N.S.W.), 68; *cf. Kelly v. Fitzgerald*, 11 Q.L.J., 9. After the issue of a rule *nisi* for a prohibition, if the respondent offers to abandon the proceedings sought to be prohibited, the relator will not be allowed his costs of prosecuting the rule further; *Ry. v. Leech*, *ex parte Shire of Tullaroop*, 2 A.L.T., 19. Where justices acted perversely in proceeding with a case when the Act, which in clearest possible terms deprived them of jurisdiction, was called to their attention, prohibition was granted with costs against them; *Ex parte Britt*, 14 W.N. (N.S.W.), 7.

28. If judgment is given for the prosecutor, the judgment shall include a direction that a writ of Prohibition shall issue.

Proceeding on judgment.
Q. Or. 81, r. 29.

The fee payable on seal of writ of prohibition is £1. Rule of Court, 6th October, 1903.

Writ of
Procedendo.

Q. Or. 81, r. 30.

29. When a writ of Prohibition has been issued, and it is afterwards made to appear to the Court or Justice that relief ought to be given against the judgment or order by which the writ was awarded on any ground on which relief might be given against a judgment in an action, the Court or Justice may direct that a writ, called a writ of Procedendo, shall be issued commanding the judicial tribunal to which the writ of Prohibition was issued to proceed to hear or determine the matter in question or otherwise proceed therein as if the writ of Prohibition had not been issued.

Prohibition by
order.

30. The Prohibition may be expressed in an order of the Court without the issue of a writ, which order shall have the same effect as a writ of Prohibition.

5. Quo Warranto.

Relator to be
named.

Q. Or. 81, r. 31.

31. Upon an application for an order for leave to exhibit as information of Quo Warranto, or for relief of a like nature, the applicant must state by his own affidavit that the application is to be made at his instance as relator.

The Court or a Justice may allow a new relator to be substituted for the original relator, on such terms as to costs or otherwise as are just.

As to *quo warranto* generally, see *Jud. Act*, sec. 33, p. 135, *supra*; as to application for an order, see rr. 1, 2, *supra*.

Where a Returning Officer has improperly refused to receive the nomination paper of a candidate, and has proceeded with the election and made a return, *quo warranto* is the proper remedy; *Ex parte Attenborough, in re Bent*, 5 W.W. & A'B. (L.), 103.

The Court will make the rule absolute, although the defendant has resigned the office, and his resignation has been accepted before the rule was obtained, when the object of the relator is, not only to cause the defendant to vacate the office, but to substitute another candidate at once in the office. In making the rule absolute the Court will exercise a discretion as to costs; *The Queen v. Hobbler*, 1 Q.L.J., 182.

ACTING IN OFFICE.—The Court discharged a rule for a *quo warranto* information, it not appearing by the affidavits that the person whose title was impeached had acted in or accepted the office, and refused leave to amend; *R. v. Smith, ex parte O'Dea*, 6 S.C.R. (N.S.W.), 259. Where the affidavits on which the rule was granted did not show that the respondent had acted in the office, the Court refused to allow the applicant to supply the defect in his affidavit by admissions filed on behalf of the respondents, and discharged the rule; *In re Mitchell*, 2 S.C.R. (N.S.), N.S.W., 214.

DELAY.—Before granting a writ of *quo warranto* the Court must be satisfied that the relator has shown good reason for his delay in not applying within a reasonable time from the cause of complaint ; *Reg. v. Laurens*, 3 A.J.R., 46.

COSTS.—In New South Wales it was held that where the respondent has not acted after service of the rule *nisi* for an ouster and submits, no costs will be granted, even although the respondent was warned before the election that his nomination was invalid, and sat in the council after being notified that steps were to be taken to oust him ; *In re Howarth*, 17 W.N. (N.S.W.), 70. A respondent will be ordered to pay the costs of a successful motion to oust him if he contests the matter, even though he has not acted after the election ; *Ex parte Coghlan*, 16 W.N. (N.S.W.), 23. When a party takes an advantage, and holds a position to which he is not entitled, he must pay the costs of the person who challenges the claim to that position and succeeds ; *R. v. Lane*, 3 Q.L.J., 66.

32. Every objection intended to be made to the title of the defendant or person called on to show cause shall be stated in the order nisi, and no objection not so stated shall be raised on the return of the order nisi, or in the information, without the leave of the Court or Justice.

Objections to be stated in order nisi.
Q. Or. 81, r. 32.

FORM OF RULE.—A rule *nisi* for a writ of *quo warranto* must state the grounds upon which it was obtained ; *In re Municipal Council of Smythesdale*, 1 W. & W. (L.), 117.

33. An information shall not, without the leave of the Court, given in open Court, be filed until the applicant has given security in the sum of Fifty pounds conditioned to prosecute the information with effect, and to pay to the defendant such costs, if any, as the Court or a Justice shall order.

Security for costs.
Q. Or. 81, r. 33.

As to security in general, see Or. 25.

34. The information shall set forth the facts relied on by the relator as invalidating the title of the defendant to the office in question in the same manner as in a statement of claim.

Form of information.
Q. Or. 81, r. 34.

As to pleading generally, see Or. 14 ; as to statement of claim, see Or. 16.

35. The information shall be in the name of the Attorney-General or the relator, as the case may be, on behalf of His Majesty, and shall be signed by the Attorney-General or relator.

Signature and service of information.
Q. Or. 81, r. 35.

A copy of the information shall be served upon the defendant, or, if at the return of the order nisi he appeared by solicitor, then upon his solicitor.

36. The defendant shall plead to the information within the same time and in the same manner as if the information were a statement of claim in an action, and thereupon the same proceedings shall be taken in all respects as if the proceeding by information were an

Defence and subsequent proceedings.
Q. Or. 81, r. 36.

action in which the relator was the plaintiff and the defendant was the defendant.

As to pleading after statement of claim, see Or. 14, Or. 17.

Judgment :
Costs.

Q. Or. 81, r. 27

37. If judgment is given for the Crown, the judgment shall award that the defendant be ousted from the office usurped by him.

Disclaimer.

Q. Or. 81, r. 38.

38. The defendant may, if he thinks fit, disclaim the office in question. Such disclaimer shall be signed by the defendant and attested by a commissioner for affidavits, and shall be filed, and a copy thereof shall be served on the relator within the time allowed for delivering a defence.

The relator shall thereupon, unless the Court or a Justice otherwise orders, be entitled to enter judgment of ouster with costs, including the costs of the order giving leave to exhibit the information.

As to time allowed for delivering a defence, see Or. 17, r. 6. The fee on filing a disclaimer of office by defendant is £1; Rule of Court, 6th October, 1903.

Consolidation.

Q. Or. 81, r. 39.

39. When proceedings by information of Quo Warranto, or for relief of a like nature, are pending against several persons for usurpation of offices of the same nature, and upon the same grounds of objection, the Court or a Justice may direct the proceedings to be consolidated, as in the case of actions, and for that purpose may make such orders as are just.

But an order for consolidation or stay of proceedings against any defendant shall not be made upon the application of a defendant, unless he undertakes to enter a disclaimer in the event of judgment being given for the relator in the proceeding which is not stayed.

As to consolidation of causes or matters, see Or. 39; as to stay of proceedings, see Or. 38.

6. Writ of Assistance.

To issue by
order of Justice.

Q. Or. 81, r. 40.

40. A writ of assistance may be issued upon the order or fiat of a Justice, to be granted upon an *ex parte* application.

The fee payable on sealing a writ of assistance is 10s.; Rule of Court, 6th October, 1903.

ORDER XLII.

HABEAS CORPUS.

Order for
production of
person in
confinement for
examination or
trial.

1. The Court or a Justice may by order, and without the issue of a writ of Habeas Corpus, direct the production of any person in confinement for the purpose of his examination as a witness, or for his trial, at a time and place to be named in the order.

As to power of Court to make an order or direct the issue of writs of *habeas corpus*, see *Jud. Act*, sec. 33 (*f*) and note thereto, *supra*, p. 136. The fee payable on sealing a writ of *habeas corpus* is £1.

2. Applications for writs of Habeas Corpus, or for orders for the production of persons in confinement for the purpose of examination or trial, may be made to the Court or a Justice *ex parte*. How applied for.
Ct., Q. Or. 82,
r. 1.

The affidavits upon which the application is made shall be entitled "In the High Court of Australia" without other title, except in the case of applications for orders for the production of persons for examination as witnesses in causes or matters pending in the Court, in which case they shall also be entitled in the cause or matter.

As to the authorities with respect to *habeas corpus*, see p. 136, *supra*.

3. The Court or Justice may make an order absolute in the first instance for the issue of the writ or production of the person, or may make an order calling upon the person who would be required to obey the writ or order, if granted, to show cause why it should not be issued or made. The order and all subsequent proceedings shall be entitled "The King against" the person to whom the writ or order is directed, except in the case of orders for the production of persons as witnesses, which shall be entitled in the cause or matter. How granted.
Ct. Q. Or. r. 82,
r. 2.

The Court refused to grant a rule absolute in the first instance; *In re Mitchell*, 9 W.N. (N.S.W.), 67.

REFUSAL OF ORDER.—The refusal to grant a *habeas corpus*, or the refusal of a writ which the legal guardian is entitled to obtain from the Court, or the refusal to make an order which the party has a right to apply for, is in itself an order; *In re Robertson*, 15 V.L.R., 483. As to the nature of a demand upon a gaoler under *Habeas Corpus Act*, 31 Chas. II., c. 2, see *Gunning v. Dwyer*, 9 A.L.T., 50.

COSTS.—Where a writ of *habeas corpus* has been allowed to go, and has been obeyed without argument, the Court has power to grant costs against the defendant; *In re Krieg*, 9 A.L.T., 73. The Court has no power to award costs against the successful applicant for a writ of *habeas corpus*; *Ex parte Hooper*, 9 W.N. (N.S.W.), 18.

4. Writs of Habeas Corpus, and orders for production directed to persons charged by law with the custody of persons in lawful custody or confinement, may be served either personally or by leaving the original with a servant or officer of the person to whom the writ or order is directed at the place where the person in question is confined or detained. Service.
Q. Or. 82, r. 3.

Other writs of Habeas Corpus must be served personally.

When a writ of Habeas Corpus is directed to more persons than one, it shall be served in the same manner as a writ of Mandamus directed to several persons.

Together with the writ there shall be served a notice, directed to the person to whom the writ is addressed, and pointing out the acts to be done by him in obedience to the writ, and the consequences of making default.

As to the manner in which a writ of mandamus directed to several persons is served, see Or. 41, r. 17; as to manner of effecting personal service; see Or. 47, r. 1.

Returns to writs
of Habeas
Corpus.

Q. Or. 82, r. 4.

5. The person to whom a writ of Habeas Corpus is directed shall, at the time and place specified therein, make his return to the writ, which shall be indorsed upon or attached to the writ, and shall set out all the causes of the detention of the person named in the writ. The return shall be filed.

In Victoria a return to a writ may be on paper and need not be on parchment; *In re Rowley*, 3 V.L.R. (L.), 8.

RETURN TO WRIT.—On motion for *habeas corpus* the Court will not take into consideration any arrangement between the prisoner and the Executive as to special return on the writ, but will assume that the officer in whose custody the prisoner is will make a usual and proper return; *In re Millar*, 3 W.W. & A.B. (L.), 41. The sufficiency of a return to a writ of *habeas corpus* was discussed in *In re McDonald*, 26 V.L.R., 332.

Amendment of
return.

Q. Or. 82, r. 5.

6. The return may be amended by leave of the Court or a Justice.

As to power of the Court or a Justice to amend, see H.C.P. Act, secs. 24; Or. 24.

Proceedings on
return.

Q. Or. 82, r. 6.

7. Upon the return of the writ the return shall be read, and a motion shall then be made for the disposition of the person therein named, or for amending or quashing the return.

FALSE RETURN.—It has been held in New South Wales that it is the right and duty of the Court to issue a rule *ex mero motu* calling upon a respondent to show cause why an attachment should not issue against him if it has reason to believe that his return to a writ of *habeas corpus* is untrue; *Ex parte West*, 2 Legge's Reports (N.S.W.), 1475.

Discharge
without writ.

Q. Or. 82, r. 8.

8. When an order to show cause has been made, the Court or Justice may, on the return of the order, direct the discharge or other disposition of the person in question without the issue of a writ of Habeas Corpus, and any such order shall be as effectual as if it had been made on the return of a writ.

Where a prisoner is before the Court on *habeas corpus*, though the writ was granted for another purpose, if the Court thinks the sentence of imprisonment illegal, it will discharge the prisoner; *In re Thompson*, 1 W. & W. (L.), 24.

ORDER XLIII.

COMMITTAL FOR CONTEMPT OF COURT.

1. When a person is alleged to be guilty of contempt of Court, committed in the face of the Court, or in the hearing of the Court, the Court may, by verbal order, direct him to be arrested and brought before it forthwith, or the presiding Justice may issue a warrant under his hand for the arrest of the accused person. Contempt in the face of the Court.
Q. Or. 84, r. 1.

When the accused person is brought before the Court, the Court shall cause him to be informed orally of the nature of the contempt with which he is charged, and shall require him to make his defence to the charge, and shall after hearing him proceed, either forthwith or after adjournment, to determine the matter of the charge, and shall make such order for the punishment or discharge of the accused person as is just.

The accused person shall be detained in custody until the charge is disposed of, unless the Court allows him to be discharged on bail.

As to attachment and committal, see Or. 35; as to power of Court to punish contempts, see *Jud. Act*, sec. 24 and note thereto, *supra*, p. 96.

2. In cases other than those in the last preceding Rule mentioned, application for punishment for contempt of Court shall be made by motion, upon notice to the accused person, for an order that he be committed to prison for his contempt. In other cases.
Q. Or. 84, r. 2.

As to disobedience of witness to order for attendance, see Or. 31, r. 3.

3. The notice of motion shall specify the nature of the contempt of which the accused person is alleged to be guilty. Form of notice.
Q. Or. 84, r. 3.

It shall be entitled in the cause or matter, if any, with reference to which the contempt is alleged to have been committed, or, if it is not alleged to have been committed with reference to any particular cause or matter, shall be entitled "The King against" the accused person, naming him.

4. The notice of motion shall be served personally unless the Court or Justice otherwise orders. Service.
Q. Or. 84, r. 4.

As to manner of effecting personal service, see Or. 47, r. 1.

Warrant.
Q. Or. 84, r. 5.

5. When a notice of motion for the committal of a person for contempt has been filed, if it is made to appear to a Justice that the accused person is likely to abscond or otherwise withdraw himself from the jurisdiction of the Court, the Justice may by warrant under his hand direct that the accused person shall be arrested and detained in custody until he gives security in such sum as the Justice directs to appear in person and answer the charge and submit to the judgment of the Court.

The warrant shall be directed to the Marshal.

As to security, see Or. 25.

Interrogatories
may be
administered.
Q. Or. 84, r. 6.

6. On the hearing of the motion the Court may order the accused person to answer on oath, within four days, interrogatories to be exhibited to him touching his contempt.

The answer to the interrogatories shall be made by affidavit.

As to interrogatories and answers, see Or. 26 ; as to computation of time, see Or. 45.

Adjournment.
Q. Or. 84, r. 7.

7. When the accused person is ordered to answer interrogatories, the hearing of the motion shall be adjourned for a sufficient time to allow the answer to be made and filed.

Punishment :
Costs.
Q. Or. 84, r. 8.

8. Upon the hearing of the motion the Court may impose a fine instead of ordering the accused person to be committed to prison, or may impose a fine in addition to ordering his committal ; and, when it imposes a fine, may order that he be imprisoned, or further imprisoned, until the fine is paid.

Order of
committal.
Q. Or. 84, r. 9.

9. When the accused person is ordered to be committed to prison, the order of committal shall specify the prison to which he is to be committed.

Discharge.
Q. Or. 84, r. 10.

10. The Court may order the discharge of a person committed to prison for contempt notwithstanding that the time for which he was ordered to be committed has not expired.

Costs.
Q. Or. 84, r. 11.

11. The costs of an application for committal shall be in the discretion of the Court, whether an order for committal is made or not.

As to costs, see *Jud. Act*, secs. 26, 27 ; Or. 46.

ORDER XLIV.

THE MARSHAL AND OTHER OFFICERS CHARGED WITH SERVICE AND
EXECUTION OF PROCESS.

1. The Marshal, and every other officer charged with the execution of process, shall return the process into Court if required by the party by whom it is sued out. Process to be returned.
Q. Or. 89, r. 1.

As to the appointment and duties of Marshal, see *Jud. Act*, sec. 53; and of Deputy Marshal, sec. 54.

The fees to be taken in the Marshal's office are to be the same as by the practice of the Supreme Court of the State in which the proceeding is taken or the act is done or authorized and required to be taken by the sheriff in respect of a like proceeding or act in a cause pending in that Court; Rule of Court, Oct. 6th, 1903.

2. The return shall be made by filing the original process in the Registry, with a certificate indorsed thereon or annexed thereto, and signed by the Marshal or his deputy, or such other officer as aforesaid, and setting forth what has been done under the process. Mode of making returns.
Ct., Q. Or. 89, r. 2.

3. When a writ of summons or other process is delivered to the Marshal or other officer specially appointed in that behalf for service upon any person, and the Marshal or officer is unable to find the person to be served, he shall, if so required by the party by whom the process was delivered to him, return the process into Court in the same manner as in the case of process of execution, with a certificate setting forth the inability. Return of non est inventus.
Q. Or. 89, r. 3.

4. No order shall issue for the return of any writ, or to bring in the body of a person ordered to be attached or committed; but a notice to the Marshal by the solicitor of the party at whose suit the writ was issued, or the order for attachment or committal was obtained, or by the party himself if he sues or appears in person, requiring the Marshal to return the writ or to make his report or to bring in the body within a specified time, shall, if not complied with, entitle the party to apply for an order for the attachment of the Marshal. Return of writ.
Ct., E. Or. 52, r. 11.

The time specified in the notice shall not be less than eight days.

Any such notice may be given in vacation as well as at any other time.

As to attachment of persons, see Or. 35; as to committal, see Or. 43; as to computation of time, see Or. 45.

Attendance of
Marshal in
Court.
Q. Or. 89, r. 4.

5. The Marshal or his deputy shall attend all sittings of a Full Court, and all sittings of the Court for the trial of causes, and of any Justice of the Court when sitting in Court on any occasion when he is required by the Justice or Court to do so.

Or his officers.
Cl., A.R. 1894,
r. 105.

6. Whenever, by reason of distance or any other sufficient cause, the Marshal or his deputy cannot conveniently execute any instrument in person, he shall employ some fit person as his officer to execute it.

ORDER XLV.

TIME.

Exclusion of
Sundays and
Court holidays.
Cl., E. Or. 64,
r. 2.

1. When any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sundays and Court holidays shall not be reckoned in the computation of the time.

As to Court holidays, see Or. 48, r. 4 ; as to reckoning time, see also the *Acts Interpretation Act* 1901, secs. 36, 37.

Time expiring
on close day.
Cl., E. Or. 64,
r. 3.

2. When the time for doing any act or taking any proceeding expires on a Sunday or Court holiday, and by reason thereof the act or proceeding cannot be done or taken on that day, the act or proceeding shall, so far as regards the time of doing or taking it, be held to be duly done or taken if done or taken on the next day which is not a Sunday or Court holiday.

Cf., the *Acts Interpretation Act* 1901, sec. 36 (2).

As to Court holidays, see Or. 48, r. 4.

No delivery of
pleadings in
vacation.
Cl., E. Or. 64,
r. 4.

3. Pleadings shall not be delivered or amended in vacation unless directed by the Court or a Justice.

As to delivery of pleadings, see Or. 14, *et seq.* ; as to vacations, see Or. 48, r. 3.

When a declaration had been delivered in vacation, a judgment for plaintiffs, signed in default of plea by the defendant, was set aside ; *Stewart v. Fitzgerald*, 1 S.C.R. (Q.), 122.

Vacation not to
be reckoned in
time for
delivery, &c., of
pleadings.
Cl., E. Or. 64,
r. 5.

4. The time of the vacations shall not be reckoned in the computation of the times appointed or allowed by these Rules for filing, amending, or delivering any pleading, unless so directed by the Court or a Justice.

The time of vacations is reckoned in calculating the time within which notice of motion for new trial must be served ; *Appeal Rules*, sec. 1, r. 21. As to vacations, see Or. 48, r. 3.

5. The day on which an order for security for costs is served, and the time thenceforward until and including the day on which the security is given, shall not be reckoned in the computation of the time allowed for pleading, answering interrogatories, or taking any other proceeding in the cause.

Time for giving security for costs when not to be reckoned.
Ct., E. Or. 64, r. 6.

As to security for costs, see Or. 25, r. 9, *et seq.*

6. The Court or a Justice may enlarge or abridge the time for doing any act or taking any proceeding allowed or limited by these Rules, or allowed or limited for the like purpose by any order of the Court or a Justice, whether so allowed by way of enlargement or otherwise, upon such terms, if any, as the justice of the case requires ; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time originally allowed or limited.

Power of Court or Justice to enlarge or abridge time.
Ct., E. Or. 64, r. 7.

As to extension of time on appeal, see notes to Appeal Rules, sec. 1, r. 4.

The *Rules of the Supreme Court 1884* (Vic.) relate to procedure, and where they are speaking about time or fixing time they are speaking about or fixing time in relation to procedure, and they refer only to times fixed by the rules, not to times fixed by Statutes ; *Wynne v. Ryan*, 15 A L.T., 125.

7. Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall be effected before four o'clock in the afternoon, except on Saturdays, when it shall be effected before twelve o'clock noon. Service effected after four o'clock in the afternoon on any week day except Saturday shall, for the purpose of computing any period of time subsequent to the service, be deemed to have been effected on the following day. Service effected after twelve o'clock noon on Saturday shall for the like purpose be deemed to have been effected on the following Monday.

Time of day for service.
Ct., E. Or. 64, r. 11.

As to service generally, see Or. 47 ; as to service of originating proceedings, see Or. 7. Reference to time in a Statute means in each State or part of the Commonwealth the standard or legal time in that State or part of the Commonwealth ; the *Acts Interpretation Act 1901*, sec. 37.

8. When no proceeding has been taken in a cause for one whole year from the time when the last proceeding was taken, any party who desires to proceed shall, before taking any step in the cause, give a month's notice to every other party of his intention to proceed. When six years have elapsed from the time when the last proceeding was taken, no fresh proceeding shall be taken without the order of the Court or a Justice, which may be made either *ex parte* or upon notice. A summons on which no order has been made shall not be deemed a

Notice after delay of one year.
Ct., E. Or. 64, r. 13.

proceeding within this Rule ; but notice of trial, although avoided by non-entry or countermanded, shall be deemed such a proceeding.

The term "month" means calendar month ; see *Acts Interpretation Act* 1901, sec. 22.

In Victoria where a party proceeds to tax his costs after the lapse of one year since the last proceedings in the action, he must give the other side one month's notice of his intention to proceed with such taxation ; *Loneragan v. Dixon*, 23 V.L.R., 8. An application for a receiver was held not to be a proceeding within the corresponding Victorian rule (Or. 64, r. 13) ; *The Bank of Australasia v. Whitehead*, 24 V.L.R., 308.

ORDER XLVI.

COSTS.

Costs to be in the discretion of the Court.
Cf., E. Or. 65, r. 1.

1. Subject to the provisions of these Rules, the costs of and incident to all proceedings in the Court shall be in the discretion of the Court or a Justice : Provided that, when any cause or issue is tried with a jury, the costs shall follow the event, unless the Justice by whom the cause or issue is tried, or the Court, for good cause otherwise orders.

As to jurisdiction of High Court to award costs, see *Jud Act*, sec. 26. No appeal as to costs except by leave, *ib.*, sec. 27 ; as to costs in which the Commonwealth or States are parties, *ib.*, sec. 64 ; as to power of Justices to make rules as to taxation, *ib.*, sec. 86 ; as to taxation and allowance of fees payable to barristers and solicitors, and review of taxation, see Rules of Court, Oct. 12th, 1903 ; as to security for costs, see Or. 25, r. 9, *et seq.* ; as to security on appeal, see H.C.P. Act, secs. 35, 36, and note to Or. 25, r. 17.

COSTS IN DISCRETION OF COURT.—The true construction of a corresponding Victorian rule was held to be that it was only intended to regulate the way in which costs were to be dealt with when power was given to the Court, or independently of an Act of Parliament the Court had power to deal with costs : *In re Annand*, 17 V.L.R., 108. Cf. also, note to *Jud. Act*, sec. 26.

REFUSAL OF COSTS TO SUCCESSFUL PARTY.—Costs may be refused to a defendant where, while an injunction motion is pending, he does the act sought to be restrained, and the motion is dismissed ; *Smith v. Blacker*, 3 V.L.R. (E.), 1 : to a defendant who improperly neglects to answer letters before action ; *Ogier v. Booth*, 9 V.L.R. (E.), 160 ; *Breese v. Lindsay*, 3 V.L.R. (E.), 232 ; to a plaintiff who has been guilty of misconduct with respect to the subject matter of the action ; *Ingram v. India Rubber &c. Co.*, 24 A.L.T., 159 ; to a plaintiff on the ground that in a previous action brought by him against the defendant he neglected to join the cause of action in respect of which he has succeeded ; *Nally v. Walsh*, 24 V.L.R., 929 ; to a plaintiff in an action against a defendant for using a label like his when the plaintiff could have had an undertaking to discontinue it before the issue of the writ ; *Robertson & Sons v. Perkins & Co. Ltd.*, 2 Q.L.J., 173 ; to an appellant on a successful application of a prohibition owing to voluminous and irrelevant affidavits filed by him ; *Raven v. Cleveland D. B.*, 6 Q.L.J., 213. Where

a defendant at the opening of plaintiff's case made a certain offer to submit to judgment which the plaintiff refused, costs only were given plaintiff to the time of the offer on the ground that the defendant was kept unnecessarily at the trial; *Queensland Investment Co. v. Grimley*, 4 Q.L.J., 224.

"GOOD CAUSE."—Where the conduct of a defendant, as disclosed by the evidence at the trial of an action with a jury, was such as to lead the plaintiffs reasonably to believe that they had a good cause of action, and to induce them to prosecute the action, it was held that there was "good cause" for depriving the defendant, though successful, of his costs; *Scottish Gympie Gold Mines Ltd. v. Carroll*, 1902 S.R. (Q.), 311 (Griffith, C.J.). Conduct on the part of a plaintiff or defendant calculated to injure or defraud the public, may constitute "good cause" for depriving such party of his costs; *per* Holroyd, J., in *Wolfe v. Lang*, 14 V.L.R., 460. Where no fraud had been proved in an action for infringement of a trade mark, but the primary Judge was satisfied that the defendants had been guilty of incaution, it was held by the Full Court, on appeal, that "incaution" might be "good cause" for depriving a party of his costs; *ib.* In an action for libel a verdict for one farthing constituted "good cause" for depriving the plaintiff of his costs; *Gannon v. White*, 12 V.L.R., 589. The fact of nominal damages only being assessed in an action for malicious prosecution and slander was held not necessarily and in all circumstances to be "good cause" for depriving the plaintiff of costs; *Humby v. Sutton*, 14 V.L.R., 124. See also *Johnston v. Wilson*, 5 A.L.R. (C.N.), 69; and *Fox v. Trenwith*, 8 A.L.R., 232.

Where the jury relieved the plaintiff from aspersions cast upon him by the libels complained of, yet the defendant had practically succeeded on ten causes of action out of twelve, this was held to constitute "good cause"; *Spreight v. Syme*, 21 V.L.R., at p. 682.

There is an appeal on the question of whether there is any evidence of "good cause"; *per* Griffith, C.J., *Scottish Gold Mines Ltd. v. Carroll*, (1902) S.R. (Q.), at p. 316. Cf. also *Gannon v. White*, 12 V.L.R., 589; *Wolfe v. Lang*, 14 V.L.R., 460. An appeal was also heard in *Brilliant G. M. Co. v. Craven*, 9 Q.L.J., 144. Where in an action tried before a jury the successful party was deprived of his costs for "good cause," such costs exceeding £500, it was held that an appeal would lie to the Privy Council against the judgment depriving such party of his costs; *Wolfe v. Lang*, 10 A.L.T., 117.

An application to deprive a successful defendant of his costs in an action tried with a jury is in time if made before the Judge has exercised his discretion with respect to costs, although judgment has been given in the action; *Scottish Gympie G. M. Ltd. v. Carroll*, (1902) S.R. (Q.), 316.

COSTS FOLLOW EVENT.—In an action for libel, tried before a Judge and jury, certain issues were raised on the pleading all of which were found by the jury in the defendant's favour; the defendant had also paid money into Court; no application relative to costs had been made at the trial: *Held*, that the defendant was entitled to all the costs of the action; *Tompsett v. Wilson*, 12 A.L.T., 52. A plaintiff may be entitled to the general costs of an action for libel notwithstanding that the defendant has been successful on the great majority of counts, and that the damages awarded on the other counts were only nominal; *Smith v. Syme*, 1 A.L.R. (C.N.), 33.

EVENT.—The word “event” means the conclusion of the whole matter or proceeding commencing with the writ of summons and ending with final judgment, and the costs which follow the event include all costs legitimately incurred in the entire action—that is to say, the costs of any previous unsuccessful trial, as well as the costs of the trial which led up to the event; *Lucas v. Mayor of South Melbourne*, 12 V.L.R., 678.

SECOND TRIAL.—Where a case is heard before a jury and the jury disagree and a second trial immediately takes place, costs are in the discretion of the Judge. Costs of both trials were granted by Griffith, C.J., to a successful defendant; *McCafferty v. Gregory*, Queensland Dig., col. 54. *Seem*, the costs of a second trial will only be granted when the circumstances of the case are such that any jury might reasonably disagree; *Stanvix v. Howard Smith & Sons, A.* When the jury are unable to agree the successful party is not entitled as a matter of right to the costs of the first trial; *Ready v. Byrne*, 2 Q.L.J., 8.

“Where the first trial has resulted in a disagreement of the jury, and where the jury have agreed in the first trial, but their verdict has been set aside, we think that in both these cases the costs follow the event unless application be made to the Judge at the trial, and the Judge, for good cause shown, shall otherwise order;” *per Full Court (Vic.)*, 12 V.L.R., at p. 681.

TWO ACTIONS.—The fact that a plaintiff in an unsuccessful action by himself and his wife for injury to her failed to add his personal claim for damages, and in a subsequent action against the same defendant recovered a substantial amount in respect of that claim, may be a sufficient reason for depriving him of his costs of the second action. A. and his wife brought an action against B. for damages for injury to the wife caused by B.’s negligence. The jury gave a verdict for the defendant. Subsequently A. brought an action against B. in respect of the same subject-matter for injury caused to A. himself. The jury awarded substantial damages: *Held*, that A. was entitled to costs, but that the defendant’s costs in the first action should be taxed as between solicitor and client, and should be set-off as against A.’s costs in the second action; *Nally v. Walsh*, 24 V.L.R. 929.

SEVERAL CAUSES OF ACTION.—In an action where several causes of action are joined the Judge has power to enter up judgment on any one cause as to which the jury have agreed, although as to the remaining causes of action the jury have been unable to agree, and has power under Or. 65, r. 2 (Vic.), to award the successful party the costs of that particular issue on which the verdict has been given; *Speight v. Syme*, 20 V.L.R., 107.

PAYMENT OF COSTS BY SUCCESSFUL PARTY.—Where an action is tried by a Judge without a jury, and the plaintiff recovers a nominal sum only, he may be ordered to pay the whole of the defendant’s costs; *Vale v. Nicholl*, 13 V.L.R., 437. In *Warr v. Opie*, 3 A.L.R. (C.N.), 81, Williams, J., intimated that if he had power he would order the defendant, for whom he found, to pay plaintiff’s costs, and referred to *Foster v. G.N. Railway Co.*, 8 Q.B.D., 515; *Dick v. Yates*, 18 C.D. 76; and feeling he was bound by these authorities, entered judgment for the defendant without costs.

A plaintiff who partially succeeds on a minor issue in an action involving other issues relating to large and important questions as to which the plaintiff is

unsuccessful, may be ordered to pay the costs of the action, although he is entitled to the costs of the issue on which he succeeds; *Gray v. L. Stevenson & Sons Ltd.*, 25 V.L.R., 476.

DEFENDANT PAYING COSTS OF CO-DEFENDANT.—*Querre*, whether the Court can order one of two defendants to pay the costs of all parties in a case where both defendants are equally liable to the plaintiff; *Murdock v. Greer*, 17 W.N. (N.S.W.), 1. In *Knight v. Bell*, 13 V.L.R., 878, it was held the Court could order a defendant to pay a co-defendant's costs of action.

SEVERAL PARTIES HAVING SAME INTEREST.—One set of costs only was allowed; *Wallace v. Wallace*, 24 V.L.R., 859. See also *Chadwick v. McMullen*, 19 A.L.T., 122; for a case in which certain costs of one of two defendants were disallowed on the grounds that the defendants had severed their defences without sufficient reason—their being no conflict of interests and nothing to prevent one solicitor acting with consistency for both—and that it would not be equitable to compel the plaintiff to pay the extra costs occasioned by such severance.

SOLICITOR ORDERED TO PAY.—A Judge has power to make an order that the solicitor of the plaintiffs pay the defendants their costs, if satisfied that the actions would not have been brought against the defendants but for champertous agreements made between the solicitor and the plaintiffs; *Reilly v. the Melbourne Tramway and Omnibus Co. Ltd.*, 19 V.L.R., 461. A solicitor who fomented litigation in order to serve a purpose of his own is liable to pay the costs of that litigation if he knows that it is frivolous and vexatious, and brought *mala fide* without any expectation of a favourable result, and merely to make costs or annoy. But where a solicitor believes that his client has a good cause of action and acts otherwise fairly, he cannot be made liable for costs merely because he has an object of his own to serve when he advises his client to take proceedings; *In re O'Brien*, 21 V.L.R., 100.

AMENDMENT.—Where amendments are allowed which will cause the action to proceed at some length with regard to matters not charged against one of several defendants, the costs of such defendant with respect to such amendment should be left to the judge who tries the case; *McLeod v. Henty*, 25 V.L.R., 648.

DEFENCE AND COUNTERCLAIM.—Where in an action, judgment is ordered to be entered for the defendant on the statement of claim, without costs, and for the defendant on his counterclaim, with costs, the defendant, on the taxation of his costs of the counterclaim, is entitled to all such costs as were necessarily incurred for establishing the counterclaim, even if part of them went to and established the defence; *Lloyd v. Looker*, 20 V.L.R., 468. In an action where there is a claim and a counterclaim, not in the nature of a set-off, and the plaintiff succeeds upon his claim and the defendant on his counterclaim, the claim and the counterclaim should for the purpose of entering judgment and taxation of costs be treated as separate actions, and judgment should be entered, with costs, for each party for the amount recovered by him on his claim and counterclaim respectively. The costs of any issue of the counterclaim on which the defendant has failed should be borne by him, and costs common to both claim and counterclaim should be apportioned; *Bank of Victoria v. Synnot*, 11 V.L.R., 598. But compare r. 7, *infra*.

PARTY ADDED TO ACTION.—Where a party has been added to an action, and may, in consequence thereof, be prejudicially bound by the decision, in such

action, he is entitled to costs if successful; *Wills v. The Trustees Executors and Agency Co. Ltd.*, 25 V.L.R., 391.

ALTERNATIVE ORDER.—*Semble*, per Griffith, C.J., where costs are ordered to be paid by defendant to the plaintiff, and, in the event of the plaintiff being unable to recover such costs from the defendant, to be paid out of a fund, the return of *nulla bona* to a writ of *fi. fa.* issued against the defendant for the costs is sufficient proof of the plaintiff's inability to recover, so as to let him have recourse to the fund; *In re Verin*, 1902 S.R. (Q.), 33.

ADJOURNMENT OF TRIAL.—In West Australia it was held that on an application for adjournment the Court has no power to make the payment of costs a condition precedent unless special circumstances be alleged in the Court; *Walden v. Bateman*, 5 W.A.L.R., 83. Where a plaintiff obtains an adjournment with leave to amend by adding necessary parties, he should pay the costs of the day; *Tipping v. Richelieu*, 18 V.L.R., 772; cf. also, *Falkingham v. Harbison*, 24 V.L.R., 76. Where a plaintiff who intended to appear in person was absent when the case was called on, owing to its coming on unexpectedly, the Court allowed the plaintiff's father to apply for an adjournment, and granted it on the plaintiff's father undertaking to pay the costs of the day; *Lucas v. Meagher*, 13 W.N. (N.S.W.), 67.

APPEAL AS TO COSTS.—Where costs were entirely within the discretion of the Judge, it was held that the decision could not be reviewed; *Conroy v. Knox* (1902), S.R. (Q.), 20. See also, note to *Jud. Act*, sec. 27.

Costs of issues to follow event.
Cf., E. Or. 65, r. 2.

2. When several issues, whether of fact or law, are raised in a cause, the costs of the several issues respectively, both of law and fact shall, unless otherwise ordered, follow the event.

Costs of cause removed from inferior Court.
E. Or. 65, r. 3.

3. When a cause is removed from an inferior Court which had jurisdiction in the cause, the costs in the Court below shall be costs in the cause.

As to removal of causes generally, see *Jud. Act*, sec. 40, *et seq.*; as to certiorari, see Or. 41, rr. 1-12.

Costs of solicitor guardian *ad litem*.
Cf., E. Or. 65, r. 13.

4. When a solicitor acts as the guardian *ad litem* of an infant or is appointed to be guardian *ad litem* of a person of unsound mind, in any cause or matter, the Court or a Justice may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid either by the parties to the cause or matter, or some of them, or out of any fund in Court in which the infant or person of unsound mind is interested, and may give directions for the repayment or allowance of such costs as the justice and circumstances of the case require.

As to appointment of guardian *ad litem*, see Or. 2, rr. 12-16.

Costs out of estate.
E. Or. 65, r. 14a.

5. The costs occasioned by an unsuccessful claim or unsuccessful resistance to any claim to any property shall not be paid out of the estate unless the Court or a Justice so orders.

An executor's right of recourse to his trust estate for costs incurred by him *quid* executor, is a right arising from the nature of the contract between himself and the author of his trust, and one which can only be lost by such inequitable conduct on his part as may amount to a culpable neglect or violation of his duty as executor; *Corigan v. Farrelly*, 7 Q.L.J., 105.

As to practice as to enforcing solicitor's lien over fund in Court, see *In re Forbes*, 6 Q.L.J., 26.

6. When some of the persons entitled to a distributive share of a fund are ascertained, and difficulty or delay has occurred or is likely to occur in ascertaining the persons entitled to the other shares, the Court or a Justice may order or allow immediate payment of their shares to the persons ascertained without reserving any part of those shares to answer the subsequent costs of ascertaining the persons entitled to the other shares; and in any such case such orders may be made for the ascertainment and payment of the costs incurred down to and including such payment as the Court or Justice thinks just.

Distribution not to be delayed by difficulties as to some shares.
E. Or. 65, r. 14c.

7. When in any cause or matter any sum of money is ordered to be paid by one party to another, whether for debt, damages, or costs, and in the same cause or matter the party to whom the sum is to be paid is ordered to pay any sum, whether for debt, damages, or costs, to the party by whom the first-mentioned sum is to be paid, one of the sums shall be set-off against the other without any order for that purpose, and the balance, if any, shall be payable by the party by whom the larger sum is ordered to be paid, and to the other party.

Set-off of damages and of costs in same cause or matter.
Ct., E. O. 65, r. 14.

As to the costs of different issues following the event, see r. 2, *supra*; as to set-off in different causes of matter, see r. 8, *infra*; as to set-off, see *Cox, Dowling & Co. v. Jones*, 4 Q.L.J., 61.

SEVERAL ISSUES.—Where judgment was entered for the plaintiff for damages and costs on certain issues on which he succeeded, and for the defendant on the issues on which he succeeded, it was held that, on taxation, the costs allowed to one party should be set-off against the costs and damages allowed to the other party; *Speight v. Syme*, 20 V.L.R., 393.

8. Money recovered by one party against another party in any cause or matter shall not be set-off against money recovered by the latter party against the former in another cause or matter, except subject to the liens of their respective solicitors upon the sum so recovered, but may be set-off subject to such liens.

Set-off in different causes or matters.
Q. Or. 91, r. 12.

In *King v. A.J.S. Bank*, 4 Q.L.J., 71, it was held that certain judgments could not be set-off, and even if they could have been the Court would not, under the circumstances, have allowed it, except subject to the lien of the plaintiff's solicitor for his costs; see also *Carroll v. Jensen*, 10 Q.L.J., at p. 61.

Costs of
incidental
applications.
Q. Or. 91, r. 13.

9. Unless the Court or a Justice otherwise orders, the costs of a motion or application in a cause shall be deemed to be part of the costs of the cause of the party in whose favour the motion or application is determined, unless the motion or application is unopposed, in which case the costs of both parties shall be deemed to be part of their costs of the cause, unless the Court or a Justice otherwise orders.

Costs of motion
not disposed of.
Q. Or. 91, r. 14.

10. When a motion or application or other proceeding is ordered to stand over to the trial, and no order is made at the trial as to the costs of the motion, application, or proceeding, the costs of both parties of such motion, application, or proceeding shall be deemed to be part of their costs of the cause.

As to costs reserved, see r. 11, *infra*.

Costs reserved.
Q. Or. 91, r. 15.

11. When the costs of any motion or application or other proceeding in a cause or matter are reserved by the Court or Justice, no costs of such motion, application, or proceeding shall be allowed to either party without the order of the Court or Justice.

Costs when
further pro-
ceedings become
unnecessary.
Q. Or. 91, r. 16.

12. When for any reason the further prosecution of any cause or matter becomes unnecessary except for the purpose of determining by whom the costs of the cause or matter should be paid, any party may apply to the Court or a Justice to determine that question, and thereupon the Court or Justice may make such order as is just.

Costs of
unnecessarily
expensive
proceedings.
Cl., E. Or. 65,
r. 11.
Q. Or. 91, r. 17.

13. When a party takes proceedings of an unnecessarily expensive character, the Court may order the costs incurred by the proceedings, so far as they are in excess of the costs which would have been incurred by proceedings of a less expensive character, to be borne and paid by the party by whom the proceedings are taken, although he is otherwise entitled to the costs of the cause or matter.

Where the relief could have been obtained by a special case and the appellant proceeded by way of mandamus, the costs were limited to those of a special case; *R. v. Licensing Justices of North Brisbane*, 6 Q.L.J., 95. Where an application was made by motion which could have been made by summons, the applicant though successful was only allowed the costs which would have been incurred by proceeding by summons; *Trickey v. Maynard*, 5 Q.L.J., 115.

ORDER XLVII.

SERVICE.

Personal service.
Cl., E. Or. 67,
r. 5.

1. When any document is required to be served personally, service shall, unless otherwise provided by Rules of Court, be effected by delivering to the person to be served a copy of the document to be served, and, if that document is not the original document, at the same

time showing him the original if he so requires, or by delivering to him an office copy of the document to be served.

As to service of originating proceedings, see Or. 7; as to service out of the jurisdiction, see Or. 7; as to delivery of pleadings, see Or. 14, r. 7; as to time of day for service, see Or. 45, r. 7.

2. In any case in which personal service of any document is required by these Rules or otherwise, if it is made to appear to the Court or a Justice that prompt personal service cannot be effected, the Court or Justice may make such order for substituted or other service, or for the substitution of notice for service, by letter, public advertisement, or otherwise, as is just.

Substituted
service.
Ct., E. Or. 67,
r. 6.

Service so effected in accordance with any such order shall have the same operation as personal service.

As to substituted service of originating proceedings, see Or. 7, rr. 8, 9. In Victoria it was held that substituted service of an order *nisi* to review a decision of justices may be allowed. It would appear that the Court has a general jurisdiction to make such an order; *McManamny v. Ross*, 23 V.L.R., 89.

3. When it is intended to enforce obedience to a judgment or order by process of attachment, the judgment or order must be served personally upon the person against whom the process is to be sought.

Service of
judgments and
orders.
Ct., E. Or. 67,
r. 1.

Except as aforesaid, personal service of a judgment or order shall not be necessary, nor need the original be shown unless required by the party served.

As to attachment and committal, see Or. 35, Or. 43; as to service of order being necessary, see *Anderson v. Anderson*, Queensland Dig., col. 12.

SUBSTITUTED SERVICE.—Although rule 39 of the Equity Rules (N.S.W.) requires personal service of an order which it is desired to enforce by attachment, the Court will permit substituted service of such an order where reasonable efforts have been made to effect personal service, but without success, in consequence of the party avoiding service; *Matthews v. Halloran*, 20 W.N. (N.S.W.), 36.

4. Any document of which personal service is not prescribed by an Act or by these Rules, shall be sufficiently served if left within the prescribed hours, if any, at the address for service of the person to be served as defined by these Rules with any person resident at or belonging to that place.

Mode and time
of service when
not personal.
Ct., E. Or. 67,
r. 2.

As to the indorsement of address for service, see Or. 1, rr. 3, 4; as to time of day for service, see Or. 45, r. 7.

5. Notices sent from any office of the Court may be sent by post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof, and the posting thereof shall be a sufficient service.

Service of
notices from
Court.
E. Or. 67, r. 8.

Service when no appearance or no address for service.

Cf., E. Or. 67, r. 4.

6. When no appearance has been entered for a party, or when a party or his solicitor, as the case may be, has omitted to give an address for service as required by these Rules, all documents in respect of which personal service is not prescribed by an Act or by these Rules may be served by filing them in the Registry.

Any document so filed shall be stuck up in the Registry, and shall remain so stuck up for fourteen days.

As to delivery of pleading by filing, see Or. 14, r. 7; as to computation of time, see Or. 45.

Service upon solicitor of party formerly appearing in person.

E. O. 67, r. 7.

7. When a party after having sued or appeared in person has given notice in writing to the opposite party or his solicitor, through a solicitor, that that solicitor is authorized to act in the cause or matter on his behalf, all documents which ought to be delivered to or served upon the party on whose behalf the notice is given shall thereafter be delivered to or served upon that solicitor at the address given in the notice.

A defendant who has appeared in person cannot be represented until notice in writing of the employment of a solicitor has been served on the opposite party; *Adams v. Adams*, 7 A.L.T., 82. There is nothing in the rules requiring that notice given through a solicitor by a party after having appeared in person, that such solicitor is authorized to act in his behalf shall be filed. It is sufficient if "notice in writing" be given "to the opposite party or his solicitor." *Liebmann v. Foot*, 1 A.L.R., 16.

Service not to be effected on Sunday, Good Friday, or Christmas Day.

A.R. 1894, r. 103.

E. Or. 67, r. 12.

Affidavits of service.

E. Or. 67, r. 9.

8. No instrument, except a warrant to arrest property in an action *in rem*, shall be served on a Sunday, Good Friday, or Christmas Day.

9. Affidavits of service shall state the time when, the place where, the person by whom, and the manner in which, the service was effected.

As to affidavits generally, see Or. 32; as to affidavit of service of subpoena see Or. 31, r. 16.

ORDER XLVIII.

SITTINGS AND VACATIONS.

Full Court.

Cf., E. Or. 63, r. 1.

Q. Or. 92, r. 1.

1. Sittings of a Full Court shall be held in each year on days to be appointed for that year by Rule of Court, and on such other days as are specially appointed by Rule of Court.

Any act or proceeding which by any Act or practice is required to be done or taken in or with reference to terms shall be done or taken in or with reference to the sittings of a Full Court annually appointed as aforesaid.

As to Full Court generally, see *Jud. Act*, sec. 19, *et seq.* ; as to places where Full Court sits to hear appeals, see Rules of Court, October 12th, 1903.

2. Sittings of the Court before single Justices shall, if there is any business to be transacted, be held at such places and on such days as are appointed by Rule of Court, and on such other days as a Justice thinks fit to sit in Court. Sittings before single Justices. Q. Or. 92, r. 2.

3. There shall be two vacations in each year, the winter vacation of four weeks, beginning on a day in June to be annually appointed by Rules of Court, and the summer vacation of eight weeks, beginning on a day in December to be annually appointed in like manner. Long vacations. Cf., E. Or. 63, r. 4.

Pleadings must not be delivered or amended in vacation ; Or. 45, r. 3. Vacation is not to be reckoned in the time for filing, amending, or delivery of pleadings ; *ib.* r. 4.

In Victoria the Court has power to sit during vacation to transact business if the exigency of the public business requires it ; *Speight v. Syme*, 20 V.L.R., 107.

4. The following days shall be observed as holidays of the Court, that is to say :—New Year's Day, Good Friday, Easter Eve, Easter Monday, Easter Tuesday, Christmas Day, the three days following Christmas Day, the Birthday of the Sovereign, the Birthday of the Heir Apparent, and such other days as are appointed by Rules of Court. Holidays. Cf., E. Or. 63, rr. 2, 6.

5. The several offices of the Court shall be open on every day in the year except Sundays and Court holidays, and shall be open from nine o'clock in the forenoon until four o'clock in the afternoon, except in the vacations, when they shall be open from nine o'clock in the forenoon until one o'clock in the afternoon, and except on Saturdays when they shall close at twelve o'clock noon. Office hours. Cf., E. Or. 63, rr. 8, 9.

ORDER XLIX.

GENERAL PROVISIONS.

1. *Seals : Process : Office Copies.*

1. The Great Seal of the Court shall be affixed to all Commissions issued by authority of the Court or a Justice, whether under the authority of an Act or of Rules of Court, to all exemplifications of proceedings in the Court, to all writs of Certiorari, Mandamus, Prohibition, and Habeas Corpus, and writs of inquiry, and to all documents issued from the Court for use beyond the Commonwealth, not being writs or other documents for service on a party to a cause, and to such other documents as the Court or a Justice in any case directs. Use of Great Seal. Cf., Q. Or. 87, r. 2.

As to the seal of the High Court and duplicate thereof, see H.C.P. Act, sec. 3; as to the use of the seals, see *ib.*, sec. 4; as to office seal, see r. 2, *infra*.

Office Seal.
Cf., Q. Or. 87,
r. 4.

2. At every Registry there shall be kept a Seal, called the Office Seal, which shall bear the words "High Court of Australia," and also the word "Registry," prefixed by the word "Principal" in the case of the Principal Registry, and by the name of the place at which the Registry is situated in the case of a District Registry.

The Office Seal shall be affixed to all writs, process, judgments, and orders and to all other documents which are authorized to be sealed, except as provided by the last preceding Rule.

Sealing writs,
&c.
Cf., Q. Or. 87,
r. 10.

3. Any person desiring to sue out any writ, process, or commission, authorized by an Act or by Rules of Court may prepare it, and present it to a Registrar for issue, and, if it appears that the document is in proper form, and that the person presenting it is entitled to sue it out, the Registrar or his clerk shall sign it and seal it with the proper seal, and it shall thereupon be deemed to be issued.

As to use of seal, see H.C.P. Act, sec. 4.

Office copies.
Cf. Q. Or. 87,
r. 13.

4. Any person entitled to have a copy of any record of the Court, or of any document filed in a Registry, may apply to the Registrar for an office copy thereof, and the Registrar shall thereupon cause a copy of the record or document to be made and examined, and to be marked with the words "Office Copy," and sealed with the Office Seal. Every such copy shall be deemed to be a certified copy within the meaning of any law relating to certified copies.

As to the fee payable for office copies, see Rule of Court, October 6th, 1903, sub-title "Copies."

2. General.

Non-compliance
with Rules not
to render
proceedings
void.
E. Or. 70, r. 1.

5. Non-compliance with any Rule of Court, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a Justice so directs; but the proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Justice thinks fit.

No proceedings are invalidated by any formal defect or by any irregularity, see H.C.P. Act, sec. 24; as to amendment, *ib.*, sec. 23, Or. 24.

IRREGULARITIES.—An irregularity merely can be amended under this order, but not a nullity; *Baxter & Co. v. Hill & Christie*, 22 V.L.R., 226. See also as to distinction between irregularity and nullity; *Brandon v. Bonell*, 3 S.C.R. (Q.), 12.

The following irregularities have been held to be curable :—The omission in an affidavit of a note stating on whose behalf it is filed ; *Chester v. Varty*, 23 V.L.R., 28 ; *Rudduck v. Clarke*, 6 A.L.T., 46 ; in an application for final judgment, where two days clear had not elapsed between the service of the affidavit in support and the return day of the summons, as by rule of Court required ; *Roberts v. British Bank of Australasia*, 17 V.L.R., 355 ; *Edgcumbe v. Taylor*, 8 A.L.T., 14.

The following were held to be cases of irregularity only :—The omission in the copy of a writ of summons of the name of the police magistrate who signed the original writ and the day of the month ; *Seril v. Henth*, Knox Reports (N.S.W.), 359 ; a writ of *ca. re.* issued under the hand of a commissioner, but without his seal ; *Mulligan v. Burnett*, 2 S.C.R. (Q.), 29 ; a writ of summons tested as of a day later than the date on which it was served ; *Hadley & Co. v. Henry*, 21 V.L.R., 646 ; a writ of summons in which the time limited for appearance &c., was incorrectly stated ; *Scougall v. Park & Lacy Co. Ltd.* (1902), Q.W.N., 23 ; an application made on summons to a Judge instead of by notice of motion ; *Alliance Contracting Co. Ltd. v. Russell*, 23 V.L.R., 545 ; the heading of an application under sec. 218 of the *Supreme Court Act* 1890 (Vic.), not being in the name of the solicitor ; *In re Neighbour*, 23 V.L.R., 459 ; an omission to set out the plaintiff's place of residence in a specially indorsed writ ; *Noall v. Billing*, 18 V.L.R., 576.

Where a judgment was signed upon default of appearance one day before the time limited for appearance had expired, such judgment and execution issued thereon were set aside as irregular. An irregularity of this nature is outside the rules, and cannot be cured ; *Pace v. Neil*, 19 V.L.R., 393.

6. An application to set aside any proceeding for irregularity shall not be allowed unless it is made within a reasonable time, or if the party applying has taken any fresh step after knowledge of the irregularity.

Application to set aside for irregularity, when allowed.
E. Or. 70, r. 2.

FRESH STEP.—Where a defendant had entered an appearance to a writ in which a cause of action had, without leave, been joined with an action for ejectment, it was held he had taken a "fresh step," and could not afterwards have the writ set aside or amended ; *McMillan v. Wood*, 21 V.L.R., 661. An appearance under protest does not waive any irregularity there may be in the writ ; *Hadley & Co. v. Henry*, 21 V.L.R., 646. A defendant who, with knowledge that the plaintiff had filed a memorandum of the close of pleadings too soon, obtained an order for the discovery of documents, was held thereby to have taken a "fresh step," and waived his right to object to the irregularity ; *Russell v. McLeod*, 23 V.L.R., 543.

Irregularities were held to be waived in the following instances :—By the appearance of the defendant's attorney on taxation, where the plaintiff signed judgment after a verdict before the time limited by rule 1 of *Reg. Gen.* ; *Howell v. Neeld*, 17 W.N. (N.S.W.), 64 ; by the consent of counsel for the defendant to the previous adjournment of a motion to make a rule *nisi* for attachment absolute where the affidavit of service of the rule *nisi* did not state that the original rule was shown to the defendant ; *Baird v. Ah Hung*, 15 W.N. (N.S.W.), 126. See further authorities—*Rolin and Innes, Supreme Court Practice*, N.S.W., p. 417.

FORM OF SUMMONS.—A summons to set aside a proceeding on the ground of irregularity should specify the irregularity complained of; *Savage v. Sindair*, 14 W.N. (N.S.W.), 114. A summons to set aside a judgment, on the ground that it was irregularly signed, did not state the irregularity complained of, but referred to an affidavit in which it was stated. Owen, J., held that the summons should have specified the irregularity complained of, but as that clearly appeared in the affidavit, an amendment of the summons was allowed; *Schneider v. Schrif* (No. 2), 19 W.N. (N.S.W.), 60.

In cases not provided for. Justice may give directions.

7. When a party desires to take any step in a cause or matter, and the manner or form of procedure is not prescribed by Rules of Court, or by the practice of the Court, the party may apply to a Justice for directions, and any step taken in accordance with the directions given by the Justice shall be deemed to be regular and sufficient.

This rule is taken from the introductory part of the Queensland Rules of Court, October 10th, 1900.

Solicitor to act for party.

8. Whenever by Rules of Court any act is required to be done by, or to, or with reference to a party, then in the case of a party who sues or appears by solicitor, the act shall be done by, or to, or with reference to, his solicitor, unless it is expressly provided that it shall be done by, or to, or with reference to, the party in person.

Forms.

9. The Forms in the Appendix to these Rules shall be used for the purposes to which they are respectively applicable, with such variations as circumstances require.

APPEAL RULES.

PART II.—APPELLATE JURISDICTION.

APPEAL RULES.

SECTION I.

APPEALS FROM JUSTICES OF THE HIGH COURT AND NEW TRIALS.

1. Appeals.

1. Appeals to a Full Court from judgments of Justices of the High Court, whether in Court or Chambers, shall be by way of rehearing.

Appeals to be by way of rehearing.
Cf. E. Or. 58, r. 1.

Appellate jurisdiction of the High Court shall be exercised by the Full Court : *Jud. Act*, sec. 20 ; as to quorum of Full Court on appeal from a Justice of the High Court exercising original jurisdiction, see *ib.*, sec. 19 ; as to decision of Full Court in case of difference of opinion, see *ib.*, sec. 23 ; as to appeals with respect to costs, see *ib.*, sec. 27 ; as to jurisdiction of High Court to hear and determine appeals from Justices of the High Court in Court or Chambers, see *ib.*, sec. 34 ; as to reserved judgments, see *ib.*, sec. 14 ; as to power of Full Court to receive further evidence, see r. 9, *infra* ; as to expediting hearing, see r. 27, *infra* ; as to inspection by a Justice of property or thing when cause or matter is on appeal, see Or. 37, r. 2.

REHEARING QUESTIONS OF FACT.—As to application for new trial of cause heard before a Justice without a jury, see r. 18, *infra*. Where a case has been tried by a Judge without a jury, and he has given judgment without making any special finding on the facts, the procedure of a party dissatisfied therewith is to appeal under Order 58 (Vic.) ; *Solomon v. Jarris*, 12 V.L.R., 76.

The Court has decided again and again that it will abstain not only from overruling the primary Judge, but even from considering with any great care whether it would have arrived at the same conclusion as he did upon questions of fact ; *Colonial Bank of Australasia v. Kerr*, 15 V.L.R., at p. 320. An appellant who appeals on questions of fact from the decision of a Judge sitting without a jury has to satisfy the Full Court convincingly and conclusively that the inferences of facts which the learned Judge has drawn are not only wrong but entirely erroneous ; *Sheppard v. Penglase*, 18 V.L.R., 180 ; *Koebecke v. Middlemiss*, 11 V.L.R., 472 ; *Gray v. L. Stevenson & Sons Ltd.*, 25 V.L.R., 476.

Where a party appeals from a decision of a Judge sitting without a jury upon a question of fact, as to which there was contradictory *viva voce* evidence, it is the duty of the appellant to satisfy the Court of Appeal that the decision of the Judge was clearly wrong. *Semble*, this principle may be modified where the oral evidence and the finding are opposed to the documentary evidence, or where the evidence was wholly or in principal part taken in writing on commission; *Healey v. Bank of New South Wales*, 24 V.L.R., 694.

Where a case has been tried by a Judge without a jury, the Full Court has jurisdiction to set aside the finding and judgment, and to give such a judgment as ought to have been given by the Judge, or to order a new trial. But the Court, under the present system and practice, adheres to the principle laid down and followed under the old system, that it will not interfere with a finding of fact by Judge or jury, unless such finding be clearly shown to be wrong; *Hall v. The New Zealand Stone Company Limited*, 12 V.L.R., 335.

Where there are conflicting probabilities which render it a question whether the Judge might not have reasonably come to the conclusion at which he arrived, his verdict will not be disturbed; *Warburton v. Altson*, 11 A.L.T., 170. The Judge who tries a case without a jury, stands as to the facts in the same position as a jury, and his decision will not be set aside by the Full Court where there is a conflict of evidence; *Monk v. Woods*, 12 V.L.R., 90; 7 A.L.T., 128. Where the Judge below has had an opportunity of seeing the demeanour of the witnesses and testing their veracity, it is almost impossible for the Court, without these advantages, to say that his finding is against the evidence; *Wallis v. Wallis*, 12 N.S.W.L.R. (D.), 1; *The Alice*, 5 Moo. P.C. (N.S.), 343.

JUDICIAL DISCRETION.—The exercise of a judicial discretion is always subject to the supervision and control of the Full Court, but the Court will not review a decision founded on its exercise, unless it can be shown that injustice has been done; *per Higinbotham, J., In re Warne, ex parte Young*, 11 V.L.R., 320; 7 A.L.T., 23. See also remarks of Higinbotham, J., in *Merry v. The Queen*, 10 V.L.R. (E.), 144, cited p. 227, *supra*; *Murphy v. Chandler*, 2 Q.L.J., 64; *Royal Bank of Queensland v. Hipwood*, 4 Q.L.J., 108; *Gibbs Bright & Co. v. Clarke*, 12 V.L.R., 618.

POINT NOT RAISED IN PLEADINGS.—Where the learned primary Judge, after hearing evidence on the whole case, decided on a point not raised and which could not be properly raised between the parties, the Full Court, on appeal, having due regard to the rights and interests of the parties and the effectual attainment of a just judgment, dealt with the case on the evidence already given, without requiring a new trial or rehearing; *Bourchier v. Mitchell*, 17 V.L.R., 27.

POINTS NOT IN DISPUTE AT THE HEARING.—The Full Court cannot on appeal investigate facts which were not in dispute at the hearing, and review the judgment of the primary Judge on facts apparently not presented to him; *Haddow v. The Duke Company*, 18 V.L.R., 155, at p. 171. As to raising on appeal objections not taken at trial, see also *Stibbard v. Dominion Banking and Insurance Co.*, 17 A.L.T., 330.

Where an appellant succeeds upon a point which has not been raised before the primary Judge, the Full Court will allow the appeal, but without costs; *Drew v. Moubray*, 16 V.L.R., 484. Where an appeal was successful on a ground which was not presented to the primary Judge, the Full Court refused costs to the

successful appellant, either of the proceedings in the Court below or of the appeal, no costs having been given by the primary Judge; *McCracken v. Dacomb*, 16 V.L.R., 378.

MATTER OF PROCEDURE.—In an appeal relating to matters of procedure, the Full Court will dispose of the question on the materials which were before the Judge at the time when he made the order under appeal, and will not consider fresh facts; *Biggs v. Kelly*, 20 A.L.T., 105.

INTERPRETATION OF CONSENT ORDER.—Where an order in a suit is drawn up by the consent of the parties, and accepted by the Judge, the Court, on appeal, will not feel pressed by the interpretation put upon such order by the Judge, as it would in respect of an order made entirely by the Judge himself, but will fully interpret it according to its terms and the circumstances in which it was drawn up; *Knight v. Bell*, 13 V.L.R., 639.

NON-APPEARANCE OF RESPONDENT.—A respondent was held entitled to have the appeal dismissed with costs when the appellant did not appear on the hearing of the appeal; *Lilley v. Rigby*, 4 Q.L.J., 220.

POWER TO RESCIND ORDER.—In New South Wales it has been held that the Full Court has power to rescind its own order, even though the order be made in a previous term, but it will only do so where it is clear that the order then made was made improvidently, or on materials which are clearly shown to be false: *Ex parte Tewkesbury*, 19 N.S.W.L.R. (L.). 440.

APPEAL FROM DECISION OF THE FULL COURT.—In the case of the *Municipal Council of Sydney v. The Commonwealth of Australia*, April 20th 1904, 1 C.L.R., an application was made for leave to appeal and for a certificate under sec. 74 of the Constitution. The application was refused as counsel had advanced merely abstract reasons and had shown no special reasons why leave to appeal should be granted.

COSTS.—An application for the costs occasioned by the abandonment of an appeal, in an action in the Supreme Court, should be made by way of motion to the Full Court, upon proof of service of notice upon the appellant; *Mitchell v. The Welshman's Gold Mining Company*, 12 V.L.R., 829. Where the Full Court, on appeal, substantially upholds the judgment appealed from, it will not, without very strong reasons, interfere with the discretion of the Judge in awarding costs; *Mitchison v. Bullock*, 12 V.L.R., 512; 7 A.L.T., 151.

A party who pays costs under a judgment of the Full Court cannot upon a reversal of the judgment by an appeal to the Privy Council, in which he took no part, claim the benefit of the reversal so as to obtain repayment of such costs; *In re Cheyne*, 28 V.L.R., 503.

Where upon the hearing before the primary Judge a common error arose, partly owing to the mistake of the primary Judge and partly aided by the parties, and where upon appeal against the judgment of the primary Judge, based on such error, the Full Court decided against the appellant on grounds totally distinct from those on which the primary Judge had decided, the respondent, though successful, was not allowed costs; *Bourchier v. Mitchell*, 17 V.L.R., 27.

Where an appellant is only allowed to appeal by the indulgence of the Court, he should not get the costs of the appeal ; *Azzopardi v. Levey*, 17 A.L.T., 31.

Where a decree has been pronounced in plaintiff's favour, and the plaintiff consents to waive the benefit of portion of it, such submission should not deprive the defendant of the costs of a successful appeal ; *Irving v. The Commercial Banking Co. of Sydney*, 19 N.S.W.L.R. (E.), 54.

NUMBER OF COUNSEL.—In New South Wales where appeals by different appellants against the same respondents, involving the same point of law, but different facts, are for the purpose of convenience argued together, the Court will not hear more than two counsel on behalf of the appellants ; *Perpetual Trustees Co. Ltd. v. a'Beckett*, 17 W.N. (N.S.W.), 117.

Place for hearing
appeals.

1A. Unless otherwise directed by the Court or a Justice, appeals shall be heard at the seat of government of the State in a Registry whereof the cause is pending. The Court or a Justice may direct that any appeal shall be heard at the seat of government of some other State.

This rule was added by Rules of Court October 12th, 1903.

As to place of sitting of High Court, see *Jud. Act*, sec. 12 ; a matter heard at one place may be further dealt with at another, *ib.*, sec. 13 ; as to power of High Court to make rules regulating the sittings of the Court, *ib.*, sec. 86 (a) ; as to sittings of the Full Court, see Or. 48, r. 1.

Mode of
instituting
appeals.
Ct., E. Or. 58,
r. 1.

2. Appeals shall be instituted by notice of appeal, which shall be served and filed as hereinafter provided ; and no petition, case, or other formal proceeding other than the notice of appeal shall be necessary. The appellant may by the notice of appeal appeal from the whole or any part of the judgment appealed from, and the notice of appeal shall state whether the whole or part only of the judgment is complained of, and in the latter case shall specify the part complained of.

As to power of High Court to make rules prescribing the time and manner of instituting appeals, see H.C.P. Act, sec. 37 ; as to security not being required, except under order of the High Court, see *ib.*, sec. 35 ; see also note to Or. 25, r. 17 ; as to stay of proceedings pending appeal, see H.C.P. Act, sec. 38 ; as to appeal by personal representative on the death of a party to a judgment, see *ib.*, sec. 39.

To whom notice
to be given.
Ct., E. Or. 58,
r. 2.

3. The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected ; but the Full Court may direct notice of appeal to be served on all or any parties to the cause or matter, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as are just, and may give such judgment

and make such order as might have been given or made if the persons served with such notice had been originally parties. The notice of appeal may be amended at any time as the Full Court thinks fit.

As to amendment generally, see H.C.P. Act, secs. 23, 24, Or. 24; as to service, see Or. 47.

When in an action for tort against several sets of defendants one set of defendants claims relief against another set of defendants, and the plaintiffs appeal against a decision in favour of the first set of defendants, the plaintiffs are not bound to serve the second set of defendants with notice of the appeal; *Sly v. Campbell*, 2 Q.L.J., 193.

4. The notice of appeal must be served within the times following, respectively, that is to say :—

Time.
Cf., E. Or. 58,
rr. 13, 15a.

- (1) If the appeal is from a final judgment within twenty-one days from the date of the judgment ;
- (2) In any other case within ten days from the date of the judgment or order ; or
- (3) In either case within such extended times as the Court or a Justice allows.

The said periods shall be reckoned from the date when the judgment or order was pronounced, or, in the case of the refusal of an application, from the date of the refusal.

The times of the vacations shall be reckoned in the computations of the said periods.

In this Rule the term "final judgment" includes any judgment, decree, order, or sentence, by which the rights of the parties are finally concluded with respect to the matters in question in the cause or matter, or any of them, not being a decision upon a mere matter of procedure.

As to what is a final judgment ; cf. note, p. 144. *supra*.

EXTENSION OF TIME.—The power to grant an extension of time is discretionary, but where such extension is asked for to enable an appeal from a final judgment it will not be granted; unless under very special circumstances, and upon very special grounds; such as an act done by the respondent raising an equity against him, or by the appellant, within the prescribed time, giving unmistakable, though informal, notice of an intended appeal; *Walker v. McKinley*, 11 V.L.R., 366. In *Stacpole v. Perkins*, Queensland Dig., col. 220, the time for appealing against a judgment was extended till the next sitting of the Full Court on the ground that the plaintiff was in Melbourne, and there was not time to receive his instructions within the time prescribed, on condition of payment into Court of £500, the costs of the action up to the time of the application, with £150 as security for the costs of the appeal, the costs of the motion to be paid into Court within fourteen days, otherwise motion dismissed with costs.

Where a defeated party has allowed the time for appealing to expire, and afterwards applies to the Court to be allowed to appeal, but without showing any other reason for not having brought his appeal within the time except inadvertence, leave to appeal would only be granted, if at all, on very stringent terms; *Miskin v. Hutchinson*, 5 S.C.R. (Q.), 82.

Judgment was given on the findings of the jury on 9th May, and a stay of proceedings granted on the terms that the appeal should be sent down for the first day of the next sitting, viz., May 20th. The defendant served both the notice of motion for new trial and for appeal on 14th May, i.e., in less time than required by the rules, the terms of the stay rendering it impossible for him to give the requisite notices. Held that under the special circumstance, the Court would enlarge the time for defendant to give notice of motion for a new trial and for an appeal; *Williams v. South British Insurance Co. of N.Z.*, 4 W.A.L.R., 133.

An application to the Court in an administration suit for the removal of trustees and the appointment of others in their place was refused. On appeal from this decision a preliminary objection was raised that the appeal was too late. Held, that the fact that the estate would suffer by any delay in the appointment of new trustees was a special reason for extending the time for appeal; *Azzopardi v. Levey*, 17 A.L.T., 31.

In Victoria special leave will be granted, even after the expiration of the time limited by the rules, where justice seems to require that it should be granted; *Wyburn v. The Corporation of Canterbury*, 19 V.L.R., 302; *In re The Commercial Bank of Australia Limited*, 19 V.L.R., 333. But in granting such leave the Court will see that the successful party in the Court below is indemnified against the consequences of any act he may have done after the time limited for appealing has gone by on the faith of the judgment not having been appealed from within time: *Wyburn v. Corporation of Canterbury*, 19 V.L.R., 302. Enlargement of time was allowed in *Solomon v. Jarvis*, 12 V.L.R., 76. As to extension of time when notice of appeal has been given for a day on which the Court is not sitting, see *Alliance Contracting Co. v. Russell*, 23 V.L.R., 326.

INTERLOCUTORY ORDERS.—An order setting aside an irregular judgment and an order decreeing restitution of lands taken in execution under that judgment are both interlocutory orders; *Main v. Haskin*, 11 A.L.T., 18. An order refusing an application for an attachment for breach of an injunction or interlocutory order is not a final order; *Knight v. Bell*, 13 V.L.R., 639. See also further authorities, p. 145, *supra*.

5. The appellant shall, within the time prescribed by the last preceding Rule for serving the notice of appeal, file a copy of the notice in the Registry of the High Court in which the case is pending. And upon such service and filing the appeal shall be deemed to be duly instituted.

The fee payable on filing a copy of notice of motion instituting an appeal is 5s.; Rule of Court, October 6th, 1903.

6. When an *ex parte* application has been refused by a single Justice, the application may be renewed *ex parte* by way of appeal to a Full Court.

Notice to
Registrar.
Cl., Q. Or. 70,
r. 5.

Appeals from
refusal of
ex parte
applications.
Cl., E. Or. 58,
r. 10.

The application may be made at any sitting of a Full Court held * (*within four days if the application was made at the Principal Seat of the Court, and in any other case*) within fourteen days, from the date of the refusal, or, if a Full Court is not sitting on the last of those days, at any time not later than the first day of the next sitting of a Full Court, or within such extended time as the Court allows.

* The words in italics were omitted by the Rules of Court, October 12th, 1903. As to computation of time, see Or. 45.

7. Notice of appeal from a final judgment shall be for the first sitting of a Full Court held after the expiration of twenty-one days from the institution of the appeal, unless the respondent consents to take shorter notice. In other cases the notice of appeal shall be for the first sitting of a Full Court held after the expiration of twenty-one days from the institution of the appeal, unless the respondent consents to take shorter notice.

Length of notice.
Cf., E. Or. 58, r. 8.

TIME.—It is not a valid objection to an appeal that the appellant has given his notice of appeal for a day on which the Full Court does not sit, provided he has set the appeal down for a day on which the Court is likely to sit, although it may be after the day named in his notice of appeal; *Little v. Welsh*, 4 W.A.L.R., 3.

As to what constitutes a final judgment, see r. 4, *supra*; as to computation of time, see Or. 45.

8. Every appeal, not being an application by way of renewal of an *ex parte* application which has been refused, shall, unless the Court otherwise directs, be set down for hearing ten days at least before the day for which the notice is given.

Time for setting down.
Cf., E. Or. 58, r. 8.

As to appeals from refusal of *ex parte* applications, see r. 6, *supra*; as to computation of time, see Or. 45.

9. The Full Court shall have all the powers and duties as to amendment and otherwise of the Court or Justice appealed from, and shall have full discretionary power to receive further evidence upon questions of fact, which evidence may be taken either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave except upon appeals from final judgments, and, in any case, as to matters which have occurred after the date of the decision from which the appeal is brought.

Amendment.
Further evidence.
Cf. E. Or. 58, r. 4.

Upon an appeal from a judgment after the trial or hearing of a cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, shall not be admitted except on special grounds.

As to powers and duties of the Court as to amendment, see H.C.P. Act, secs. 23, 24, Or. 24; as to evidence, see H.C.P. Act, sec. 16, *et seq.*; as to orders and examination of witness, see H.C.P. Act, sec. 19, Or. 31; as to evidence by affidavit, see H.C.P. Act, sec. 20, Or. 32; as to final judgments, see r. 4, *supra*.

AMENDMENT.—At the hearing on appeal the Court allowed the case to stand over to allow the plaintiff to amend his claim, by putting in issue the covenants, and to make the necessary demand for a reconveyance, and to put the result in issue; *Howell v. Harding*, 12 V.L.R., 538. An amendment of a writ so as to set out the facts was allowed by the Full Court where all the facts were before it on an appeal; *Bank of Victoria v. Looker*, 21 V.L.R., 704.

FURTHER EVIDENCE.—In *Union Bank of Australia v. Paton*, 8 Q.L.J., at p. 34, by consent, leave was given to both parties to call fresh evidence on appeal, after a trial had taken place on the merits. Fresh evidence was admitted on the hearing of an appeal to the Full Court from a dismissal of a petition for dissolution of marriage on the ground that the charge of cruelty was supported by the evidence of petitioner alone: corroborative evidence was received, a *de bene* examination being admitted in evidence; *Cremar v. Cremar*, 12 V.L.R., 738; 3 A.L.T., 83. See also for cases of admission of fresh evidence; *Howell v. Harding*, 12 V.L.R., at p. 553; *Woolcott v. Peggie*, 14 V.L.R., at p. 459. The Court will allow a party appealing against a final order to file a fresh affidavit where the respondent is not thereby prejudiced; *Dierks v. Peters*, 3 A.L.R. (C.N.), 18.

The Court however, does not encourage applications to adduce fresh evidence on appeal, and will not grant them unless good reason is shown for not having adduced that evidence to the Court below; *Monk v. Woods*, 12 V.L.R., 90. Where an application is made for leave to adduce fresh evidence on an appeal to the Full Court from the decision of the primary Judge, the Full Court must be satisfied that the applicant has some further and better evidence to adduce, and that he could not with reasonable diligence have brought such evidence before the Court in the first instance; *Attorney-General v. McCarthy*, 12 V.L.R., 83. Where an application to dispense with securities to an administration bond was refused, the Full Court on appeal admitted fresh evidence on the ground that the evidence could not have been produced before, and allowed the appeal; *In re Conway*, 17 A.L.T., 50.

In Victoria, on appeal from a Judge in Chambers refusing to grant a commission to examine witnesses, on the ground of undue delay, the appellant will not be allowed to read fresh affidavits to show that the Judge had made a mistake as to the ground of delay. The appellant should renew his application to the Judge in Chambers upon such fresh materials; *Gibbs Bright & Co. v. Clarke*, 12 V.L.R., 618.

Appellants who succeeded on fresh evidence were ordered to pay the costs of the appeal; *Arida v. Sid*, 6 Q.L.J., 6; *Craven v. Harte*, 8 Q.L.J., 142.

Powers of Court
on appeal.
Cl., E. Or. 58,
r. 4

10. The Court, upon the hearing of an appeal, shall have power to draw inferences of fact, not inconsistent with the findings of the jury, if any, and to give any judgment and make any order which ought to have been given or made in the first instance, and to make such further or other order as the case requires.

The powers aforesaid may be exercised by the Court notwithstanding that the notice of appeal is that part only of the decision may be reversed or varied, and such powers may be exercised in favour of all or any of the respondents or parties, although such respondents or parties have not appealed from or complained of the decision.

The Court shall have power to make such order as to the whole or any part of the costs of appeal as is just.

As to power of Court to grant a new trial, see *Jud. Act*, sec. 36; H.C.P. Act, sec. 14; as to power of Full Court to affirm, reverse, or modify judgment appealed from, and to give such judgment as ought to have been given in the first instance, see *Jud. Act*, sec. 37; as to costs, see *Jud. Act*, sec. 26; as to matter heard at one place being disposed of at another, see *Jud. Act*, sec. 13; as to reserved judgments, see *Jud. Act*, sec. 14.

As to power of Court, see note to r. 1, *supra*, and cf., note to r. 23, *infra*.

11. It shall not be necessary for a respondent to give notice of cross appeal, but if a respondent intends upon the hearing of an appeal to contend that the decision appealed from should be varied, he shall within the time prescribed by the next following Rule, or such time as is allowed by special order of the Court or a Justice in any case, give notice of his intention to such of the parties as may be affected by such contention. The omission to give such notice shall not diminish the powers of the Court when hearing the appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal or for a special order as to costs.

When the respondent on an appeal succeeded upon a point not taken by cross-appeal, and only raised on the last day of the hearing, no costs of appeal were allowed to either party; *Hynes v. Byrne*, 9 Q.L.J., 193.

12. Subject to any special order which is made in any case, notice by a respondent under the last preceding Rule shall be given ten clear days before the day for which the notice of appeal is given.

As to computation of time, see Or. 45.

* 13. When the appeal is from a decision pronounced in a cause or matter pending in a District Registry, the District Registrar shall transmit to the Principal Registrar all such documents as may be necessary for the hearing of the appeal. After the appeal has been disposed of, they shall be returned to the District Registry.

Documents to be forwarded from District Registry.
Cf. Q. Or. 70 r. 15.

* This rule was repealed and the following rule substituted, 12th October, 1903 :—

13. When the appeal is directed to be heard at a place other than that in which the Registry in which the cause is pending is situated the Registrar of the last-mentioned Registry shall transmit to the Registrar of the Registry situated at the place at which the appeal

Transmission of Documents.

is to be heard all such documents as may be necessary for the hearing of the appeal. After the appeal has been disposed of, they shall be returned to the Registry in which the cause is pending.

Papers for
Justice.

Cf., E. Or. 58,
r. 11.

14. Four days at least before the day for which the notice of appeal is given, the appellant shall leave at the Chambers of each of the Justices who are to sit on the hearing of the appeal a copy of the Justice's notes taken in the Court below, including the notes of evidence, if any, and also a copy of the pleadings, if any, and such documents as may be necessary for the purposes of the appeal. The cost of copies of unnecessary documents will not be allowed.

As to regard being had to Justice's notes where question arises as to ruling or direction of the Justice to a jury, see r. 24, *infra*; as to reasons of Justice's decision appealed from being included among papers, see r. 26, *infra*. In Queensland the copies of the Judge's notes are obtained from Associate of the Judge whose decision is appealed from, the charge made by him for such notes is ordinarily 1s. per folio of 72 words; *Wilson and Graham Supreme Court Practice*, p. 300.

EVIDENCE.—In New South Wales it has been held that on an appeal to the Full Court it is not necessary that the evidence taken in the Court below should be before it, if the point of law to be argued does not turn on the evidence; *Tauvo v. Tauvo*, 19 N.S.W.L.R. (D.), 6.

Evidence on
appeals.

Cf., E. Or. 58,
r. 12.

15. When the evidence has not been already printed, the Court or a Justice may order the whole or any part thereof to be printed for the purposes of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof unless the Full Court otherwise orders.

Interlocutory
orders not
appealed from
not to bar
relief.

E. Or. 58, r. 14.

16. An interlocutory order or rule from which there has been no appeal shall not operate to prevent the Court, upon hearing an appeal, from giving such decision upon the appeal as is just.

As to what constitutes an interlocutory order, see p. 145, *supra*.

Rule nisi on
appeal.

Cf., Q. Or. 70,
r. 19.

17. When on an appeal from the refusal of an *ex parte* application the Court is of opinion that a rule nisi or order nisi should have been granted, the Court may grant a rule or order nisi returnable either before a Full Court or before a Court constituted by a single Justice.

2. New Trials.

Applications for
new trials of
causes heard
before a
Justice.

Cf., E. Or. 39,
r. 1.

18. Except as by Rules of Court is otherwise specially provided, every application for a new trial or to set aside a verdict, finding, or judgment, in a cause or matter where there has been a trial by a Justice of the High Court without a jury, shall be made by appeal to a Full Court.

As to power of Full Court to grant a new trial, see *Jud. Act*, sec. 36, H.C.P. Act, sec. 14; as to applications for new trial of cases tried by jury, see r. 19, *infra*; as to applications for new trial being by the Full Court, see *Jud. Act*, sec. 20. As to re-hearing questions of fact decided by a Justice without a jury, see note to r. 1, *supra*.

In the *Helidon Spa Water Co. Ltd. v. Campbell*, 10 Q.L.J., 1, the Court allowed an appeal, and entered judgment of nonsuit without prejudice to the plaintiff's right to bring a fresh action.

19. Every application for a new trial or to set aside a verdict, finding, or judgment, in a cause or matter in which a verdict has been found by a jury, shall be made to a Full Court by motion upon notice. No rule nisi or order to show cause or other formal proceeding other than the notice of motion shall be made or taken. The notice shall state the grounds of the application, and whether all or part only of the verdict, finding, or judgment, is complained of.

Applications for new trials of cases tried by jury to be by notice of motion. Cf., E. Or. 39, rr. 1A, 3.

As to power of Court to draw inferences of fact not inconsistent with findings of the jury, see r. 10, *supra*.

As to the grounds generally on which a new trial may be granted, see note to sec. 36 of *Jud. Act*, p. 154. The following decisions have been recently given:—

NEW TRIAL—VERDICT DEMONSTRABLY WRONG.—Where in an action for goods sold and delivered the Court were of the opinion that the verdict was demonstrably wrong a new trial was granted although the amount claimed was under £20; *Malouf v. John*, 20 W.N. (N.S.W.), 73.

NOMINAL DAMAGES.—In a libel action the defence was that of fair comment and the jury found a verdict for the defendant. Although two statements in the publication complained of were not justified and might have entitled the plaintiff to a verdict, the Full Court refused to grant a new trial on the ground that only nominal damages could be recovered; *Griffith v. Johnson* (1903), 3 S.R. (N.S.W.), 107.

EXCESSIVE DAMAGES.—A new trial was ordered where the damages awarded were out of all proportion to the injury sustained; *Rapken v. Adams*, 23 V.L.R., 187.

OMISSION OF QUESTIONS.—Where a party has an opportunity at the trial of asking that certain questions be left to the jury and refrains from doing so, he cannot afterwards be allowed to ask for a new trial on the ground that such questions were not left to the jury; *Howarth v. Walker*, 2 S.R. (N.S.W.), 452.

VERDICT AGAINST EVIDENCE.—The Court refused to grant a new trial though the verdict appeared to be unsatisfactory and there were indications of false swearing; *Campbell v. Railway Commissioners of New South Wales*, 20 W.N. (N.S.W.), 171.

MISCARRIAGE OF JUSTICE.—A new trial will not be granted where there has been no substantial miscarriage of justice; *Sherry and Tait v. Commissioner of Railways*, 4 W.A.L.R., 96.

FRESH EVIDENCE.—If a party applying for a new trial has had a reasonable opportunity to adduce certain evidence at the trial and has not done so, the Court

will not grant a new trial on the discovery of fresh evidence; *Healey v. Bank of New South Wales*, 24 V.L.R., 694. *Ward v. Hearne*, 10 V.L.R. (L.), 163, decides two things: "First, it must be shown clearly that the new evidence was not in the possession of the party applying, and could not, by proper diligence, have been procured by him at the time of the first trial." "Secondly, it must appear that the newly discovered evidence is such as ought, if it had been brought forward at the first trial, to have led the jury to come to a different conclusion from that at which they have arrived." Holroyd, J., in *Healey v. Bank of New South Wales* 24 V.L.R., at p. 701, had some doubt as to the word "ought," whether it should not be qualified, and some such words as "would possibly" be used instead.

IMPROPER INFLUENCE.—If the conduct of any of the jury or of any of the parties to a case, or of the legal advisers of any of the parties is such as to give rise to reasonable ground for suspicion that the administration of justice is being improperly influenced, or that there is an attempt to do so, the Court will, in order to keep justice free from all taint of suspicion, order a new trial even though upon the facts proved the Court does not believe there was any intentional impropriety, or that the verdict was actually influenced by such conduct; *Ponting v. Huddart, Parker & Co. Ltd.*, 22 V.L.R., 644. Where there had been communications between a jurymen and counsel of the successful party a new trial was ordered; *ib.*

INTEREST OF JUROR.—After verdict given the Court is very reluctant to entertain an objection to the trial, grounded upon the supposed interest or bias of one of the jurors. A new trial has been refused where a juror was a servant of one of the parties; *Howey v. Henderson*, 21 V.L.R., 396.

COSTS.—On the hearing of a rule *nisi* for a new trial on the ground that the damages were excessive, it appeared that the plaintiff had offered a compromise for a certain sum, the rule was made absolute to reduce the damages to that amount, and as the defendant did not accept the offer he was made to pay the costs of the rule; *Oudot v. Soulie*, 1 A.J.R., 35.

Amendment of
notice.
E. Or. 39, r. 5.

20. The notice may be amended at any time by leave of the Court or a Justice, upon such terms as the Court or Justice thinks just.

As to amendment generally, see H.C.P. Act, secs. 23, 24; Or. 24.

Time.
Cf., E. Or. 39,
r. 4.

21. The notice of motion must be served upon the party in whose favour the judgment was given within twenty-one days from the conclusion of the trial or the date of the pronouncing of the judgment, upon further consideration, as the case may be; or within such extended time as the Court or a Justice allows.

The time of the vacations shall be reckoned in the computation of the period aforesaid.

Extension of time for notice of motion of a new trial was refused where delay was caused by communicating with a client, and a difficulty in procuring a copy of the Judge's notes; *Picken v. The President of the Shire of Mount Alexander*, 16 V.L.R., 309.

22. Except as aforesaid, all the provisions of the foregoing Rules of this section relating to appeals shall apply to applications for new trials, or to set aside verdicts, findings, or judgments, in causes or matters in which a verdict has been found by a jury. General practice.
Q. Or. 70, r. 24.

As to trial by jury, see H.C.P. Act, sec. 12, *et seq.*

23. Upon the hearing of an application for a new trial or to set aside the verdict or finding of a jury, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, and may for that purpose draw any inference of fact not inconsistent with the findings of the jury, if any; or may, if it is of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and may direct such issues or questions to be tried or determined and such accounts and inquiries to be taken and made as it thinks fit. Power of Court.
Cf., Q. Or. 70,
r. 26.

As to power of High Court to impose conditions or direct admissions on a new trial, and to grant it generally or on some particular points only, and to order the testimony of a witness to be read on a new trial, see H.C.P. Act, sec. 14; as to powers of Court on appeal, see r. 10, *supra*.

A new trial as to a part of a case only was allowed in *Brilliant G. M. Co. v. Craven*, 9 Q.L.J., 144.

POWER OF COURT.—The Court has no power to enter up judgment for the plaintiff forthwith, and assess damages where the jury have returned an admittedly perverse verdict for the defendant; *Jacob v. Miles*, 25 V.L.R., 511.

Where a plaintiff has been awarded excessive damages the Court may assess the damages at what seems a fair sum and give the plaintiff the option of either accepting that sum or submitting to a new trial; *Greener v. Abrahams*, 2 A.L.R., 13.

Where practically the same evidence would be given at a new trial the Court exercised its power to set aside the findings of the jury, and entered judgment for the plaintiff for the amount claimed; *Clark & Fauset v. Municipality of Brisbane*, 6 Q.L.J., 131.

On an application to the Full Court for an order that a verdict of the jury be set aside and judgment entered for the defendant, or failing that, that a new trial be ordered, it was held that as the Judge had expressed himself as thoroughly dissatisfied with the result of the trial, and that as it appeared from the undisputed facts and from documentary evidence, as well as from the acts and conduct of the plaintiff that the verdict was one which reasonable men should not have returned, it should be set aside and judgment entered for the defendant; *Scown v. Haworth*, 25 V.L.R., 88.

As to the power of the Court in Western Australia on an application for a new trial or on appeal to enter judgment, and finally complete the matter without ordering a new trial, see *O'Leary v. Commissioner of Railways*, 4 W.A.L.R., 136.

The Full Court, on an appeal from the decision of a Judge at a trial with a jury, may refer to the Judge for such information as to the course of the trial as they may deem necessary to enable them to properly understand and give effect to the findings of the jury; *Howard Smith & Sons v. Burns Philp & Co.*, 7 Q.L.J., 1.

FAILURE TO APPEAR.—On an appeal by way of motion for a new trial, if the appellant fails to appear to support the motion, but the respondent does appear, the motion should be dismissed with costs; *Robinson v. Palmer*, 23 V.L.R., 211.

COSTS.—The Court in granting an application for new trial on the ground of misdirection may, if of opinion that the applicant's counsel should have drawn attention to the misdirection, deprive the appellant, though successful, of the costs of the appeal; *Ritchie v. The Victorian Railways Commissioner*, 25 V.L.R., 272.

Where an appeal from a judgment is allowed, and a new trial directed, the unsuccessful respondent may, in a proper case, be ordered to pay the costs, in any event, of the first trial; *Ryan v. Caeli*, 9 A.L.R., 109; 25 A.L.T., 6.

Where on an application to the Full Court for a new trial, an order is made "that the costs of the first trial abide the event of the new trial," the successful party in the second trial shall get the costs of the first trial, although he may have been the unsuccessful party in the first trial; *Jeske v. Gray*, 8 A.L.T., 23; *Lucas v. Mayor of South Melbourne*, 12 V.L.R., at p. 681.

3. General Provisions.

Notes of ruling or direction.
Cf., E. Or. 58, r. 13.

24. If, upon the hearing of an appeal or application for a new trial or to set aside a verdict or finding of a jury, a question arises as to the ruling or direction of the Justice to a jury, the Court shall have regard to the Justice's notes, and to such other evidence or materials as the Court deems expedient.

MATERIALS ON APPEAL.—On an appeal to the Full Court, where the evidence in the Court below has been altogether upon affidavit, copies of the affidavits should be furnished to the Full Court; *Lewis v. Klapproth*, 11 V.L.R., 214. On appeal, counsel's unverified shorthand note of the judgment appealed from cannot be received as conclusive, but may be read as part of the argument; *McKay v. Gillespie*, 11 V.L.R., 835.

As to reference to the Judge who presided for information as to cause of trial, see *Howard Smith & Sons v. Burns, Philp & Co.* 7 Q.L.J., 1.

Appeal or motion for a new trial not to be stay of proceedings.
Cf., E. Or. 58, r. 16.

25. An appeal or motion for a new trial or to set aside a verdict, finding, or judgment, shall not operate as a stay of proceedings unless the Court or a Justice so orders. Any such order may be made as to the whole or any part of the proceedings in the cause or matter, and may be made upon such terms as the Court or Justice granting the stay thinks fit.

No intermediate act or proceeding shall be invalidated except so far as the Full Court directs.

As to stay of proceedings on institution of an appeal, see H.C.P. Act, sec. 38; Or. 38, r. 1.

Stay of proceedings pending an appeal to the Full Court will not be ordered unless evidence be adduced to show that the respondent will be unable to repay the money ordered to be paid to him by the appellant, in the event of the respondent being unsuccessful on the appeal; *Hordern v. Smith*, 15 V.L.R., 512.

26. When the reasons for the decision of the Justice whose decision is appealed from have been given in writing, or are recorded in writing, a copy thereof shall be included with the documents transmitted to the Principal Registry and shall be left at the Justices' Chambers. Reasons of Justices.

27. The hearing of an appeal, or of a motion for a new trial or to set aside a verdict or finding of a jury, may be expedited by order of the Court or a Justice. Hearing may be expedited.

SECTION II.

APPEALS FROM JUDGES OF THE SUPREME COURTS OF THE STATES IN THE EXERCISE OF FEDERAL JURISDICTION; NEW TRIALS.

1. All the provisions of section I. of these Rules shall apply to appeals to the High Court from judgments of Judges of the Supreme Courts of the States sitting as Judges of first instance in the exercise of federal jurisdiction, and to applications for new trials, or to set aside a verdict, finding, or judgment, in a cause or matter in which there has been a trial by any such Judge with a jury in the exercise of federal jurisdiction; subject nevertheless to the modifications set forth in the two following Rules. Provisions of section I. to apply with certain modifications.

As to quorum on appeal from a Judge of a Supreme Court of a State exercising federal jurisdiction, see *Jud. Act*, secs. 19, 20; as to appellate jurisdiction of High Court from Judge of Supreme Court of a State exercising federal jurisdiction, see *Jud. Act*, secs. 35, 39; as to federal jurisdiction of Supreme Courts of States, see *Jud. Act*, sec. 39; as to powers of Full Court on appeal, see notes to rr. 9, 10, sec. I. of Appeal Rules; as to applications for new trials, see *Jud. Act*, secs. 20, 36, and notes to rr. 18, 19 of sec. I. of Appeal Rules.

1A. Unless otherwise directed by the Court or a Justice such appeals and applications shall be heard at the seat of government of the State. The Court or a Justice may direct that any such appeal or application shall be heard at the seat of government of some other State. Place for hearing appeals.

This rule was added by Rules of Court, October 12th, 1903.

* 2. A copy of the notice of appeal, or notice of motion for a new trial, or to set aside the verdict, finding, or judgment, shall be filed in the Supreme Court, and a copy shall also be filed in the Registry of the High Court to which the proceedings would have been transmitted if the cause had been removed by the defendant into the High Court; and the appeal shall not be deemed to be duly instituted until these copies have been filed. Notice of appeal to be filed in Supreme Court.

* This rule was repealed by Rules of Court, 12th October, 1903, and the following was substituted therefor :—

Notice of appeal to be filed in Supreme and High Court.

2. A copy of the notice of appeal, or notice of motion for a new trial, or to set aside the verdict, finding, or judgment, shall be filed in the Supreme Court, and a copy shall also be filed in the Registry of the High Court situated at the seat of government of the State; and the appeal shall not be deemed to be duly instituted until these copies have been filed.

Delivery and transmission of documents.

* 3. The proper officer of the Supreme Court shall deliver to the Registrar of the last-mentioned Registry of the High Court such documents as are necessary for the hearing of the appeal; and the Registrar, if he is not the Principal Registrar, shall transmit them to the Principal Registrar.

After the appeal or motion has been disposed of, the documents shall be returned to the proper officer of the Supreme Court, direct or through the District Registry as the case may require.

* This rule was repealed 12th October, 1903, and the following was substituted therefor :—

Delivery and transmission of documents.

3. The proper officer of the Supreme Court shall deliver to the Registrar of the last-mentioned Registry of the High Court such documents as are necessary for the hearing of the appeal; and that Registrar, if the appeal is not to be heard in the State, shall transmit them to the Registrar of the Registry of the High Court situated at the place where the appeal is to be heard.

After the appeal or motion has been disposed of, the documents shall be returned to the proper officer of the Supreme Court, by or through the Registrar of the Registry in the State, as the case may be.

SECTION III.

APPEALS FROM DECISIONS OF INFERIOR COURTS IN THE EXERCISE OF FEDERAL JURISDICTION.

Times for entering appeals.

1. Appeals to the High Court from decisions of inferior Courts of a State in the exercise of federal jurisdiction shall be entered for hearing in the High Court within such times as like appeals to the Supreme Court of the State are required to be entered.

As to quorum of Full Court, see *Jud. Act*, secs. 19, 20; as to appeals from decisions of inferior Courts of State exercising federal jurisdiction, see *Jud. Act*, sec. 39; as to power of Court to order new trial, see *Jud. Act*, sec. 38; H.C.P. Act, sec. 14; as to power of Court as to judgment on hearing appeals, see *Jud. Act*, sec. 37; as to power of amendment, see H.C.P. Act, secs. 23, 24, Or. 24; as to matter heard at one place being dealt with at another, see *Jud. Act*, sec. 13; as to reserved judgments, see *Jud. Act*, sec. 14.

POWER OF FULL COURT.—On an appeal to the Full Court from the County Court, the jury found in favour of the plaintiff in an action on an insurance policy where the evidence pointed irresistibly to the conclusion that the deceased died by his own hand, and as the jury ought as reasonable men to have come to that conclusion, and it was useless to send the case down for a new trial, judgment was entered for the defendants; *M'Pherson v. Australian Mutual Provident Society*, 5 A.L.R. (C.N.), 25.

FINDINGS OF FACT.—An appeal in Queensland from the decision of a District Court Judge, sitting without a jury, is not, as is an appeal from a Judge of the Supreme Court without a jury, in the nature of a rehearing. The findings of a District Court Judge on questions of fact can only be reviewed upon the same principles as are applicable on an appeal from the findings of a jury: that is, they can only be disregarded where it is shown that they were manifestly wrong; *Pülmer v. South O. & G.G.M. Co. Ltd.*, 10 Q.L.J. (N.C.), 20.

It is an invariable rule of the Court of Appeal in Victoria not to disturb the finding of the inferior Court on a question of fact, unless the appellate Court is satisfied beyond all reasonable doubt that the inferior Court has arrived at an erroneous conclusion. It is not sufficient that the appellate Court should entertain the greatest doubt of its correctness, but it must be satisfied that the finding is clearly wrong, or that the evidence is such that reasonable minds could not have arrived at the conclusion of fact that has been arrived at; *Jones v. Poore*, 10 A.L.T., 220.

NEW TRIAL.—COSTS.—Where in the County Court a Judge nonsuits the plaintiff at the conclusion of his case and without hearing the defendant's case, and on appeal to the Full Court, the nonsuit is set aside and a new trial ordered, the costs of the first trial should abide the event of the new trial; *Warnock v. McCulloch*, 28 V.L.R., 117. In *Coker v. Broome*, 7 Q.L.J., 71, where the plaintiff had been wrongly nonsuited, the defendant had to pay the costs of the appeal and the plaintiff's costs of the former trial were made to abide the event of the new trial.

WRONGFUL ADMISSION OF EVIDENCE.—Where on an appeal on the ground of wrongful admission of evidence it appeared that the evidence in question had been wrongfully admitted, but that there was admissible evidence upon which the verdict could have been properly found, the appeal was disallowed; *Cargeeg v. Huelin*, 4 W.A.L.R., 85.

DEATH OF RESPONDENT.—See H.C.P. Act, sec. 39. As to the practice in Queensland on death of one of several respondents, see *Briggs v. Hall* (1903), S.R. (Q.), 202.

2. The entry shall be made at the Registry at which notices of Mode of entry. appeals from decisions of Judges of the Supreme Court of the State in the exercise of federal jurisdiction are required to be filed, and shall be entered in accordance with the practice of the Supreme Court of the State relating to like appeals.

The fee payable on setting down an appeal from an inferior Court whether by special case or otherwise is £1, and on filing special case being an appeal from an inferior Court, 10s. ; Rules of Court, Oct. 6th, 1903.

SECTION IV.

APPEALS FROM SUPREME COURT OF THE STATES.

Mode of
instituting
appeals.

1. Appeals to the High Court from judgments of the Supreme Court of any State, or any other Court of any State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall be instituted by notice of appeal, which shall be served and filed as hereinafter provided, and by giving the prescribed security: and no petition, case, or other formal proceeding other than the notice of appeal and security shall be necessary. The appellant may, by the notice of appeal, appeal from the whole or any part of the judgment appealed from, and the notice of appeal shall state whether the whole or part only of the judgment is complained of, and in the latter case shall specify the part complained of.

As to quorum on appeal, see *Jud. Act*, sec. 21; as to when appeals lie from Supreme Courts of States, see *Jud. Act*, sec. 35; as to power to grant new trial, see *Jud. Act*, sec. 36, H.C.P. Act, sec. 14; as to power with respect to judgment and execution, see *Jud. Act*, sec. 37; as to the security, see H.C.P. Act, sec. 35, r. 10, *infra*; as to stay of proceedings under the judgment appealed from, see H.C.P. Act, sec. 38, r. 19, *infra*; as to matter heard at one place being further dealt with at another, see *Jud. Act*, sec. 13; as to reserved judgments, see *Jud. Act*, sec. 14.

Where an appeal from the Full Court of a State to the High Court was successful and an order was made remitting the case back to the Supreme Court a direction was made by Cooper, C.J., that the order of the High Court should be an order of the Supreme Court of Queensland; *In re Lovell* (May 30th, 1904).

Place for hearing
appeals.

1A. Unless otherwise directed by the Court or a Justice, appeals shall be heard at the seat of government of the State from a Court whereof the appeal is brought. The Court or a Justice may direct that any appeal shall be heard at the seat of government of some other State.

This rule was added by Rules of Court, Oct. 12th, 1903.

Leave to appeal.

2. Leave or special leave to appeal to the High Court from any such judgment where leave or special leave is required may be given by the High Court upon motion *ex parte*, and on such conditions, if any, as the Court thinks fit. On the hearing of the motion, such evidence shall be given on affidavit as the High Court requires. An order for leave or special leave to appeal may be rescinded on the motion of any respondent.

Applications for or special leave to appeal shall be made to a Full Court: *Jud. Act*, sec. 21.

As to leave to appeal from certain interlocutory judgments, see *Jud. Act*, sec. 35 (a); as to special leave to appeal from a judgment whether final or interlocutory, whether in a civil or criminal matter, see *Jud. Act*, sec. 35 (b) and note

on p. 151 on "special leave to appeal"; as to affidavits generally, see Or. 32; as to evidence, see *supra*, p. 152; as to rescission of the order for leave, *ib.*

3. The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the High Court may direct notice of the appeal to be served on all or any parties to the cause or matter, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as are just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as the High Court thinks fit.

To whom notice to be given.
Ct., E. Or. 58,
r. 2.

As to service, see Or. 47; as to amendment, see H.C.P. Act, secs. 23, 24.

4. The notice of appeal must be served within the times following, respectively, that is to say:—

Time.
Ct., E. Or. 58,
r. 15, 15a.

- (1) If the appeal is of right, within twenty-one days from the date of the judgment appealed from;
- (2) If the appeal is by leave of the High Court, within twenty-one days from the date of the order giving leave to appeal;
- (3) In either case, if the appeal is from a judgment given or made before the commencement of the *Judiciary Act* 1903, within such extended time as the Court or a Justice allows.

The said respective periods shall be reckoned in the first case from the date when the judgment was pronounced, and in the second case, from the date when the order giving leave to appeal was made.

5. Affidavits intended to be used upon motions for leave to appeal, and orders giving leave to appeal, shall be entitled "In the High Court of Australia," and in the matter of the cause, which shall be described as pending in the Court from which the appeal is proposed to be brought.

Title of proceedings for leave to appeal.

6. Notice of appeal and all subsequent proceedings on appeals shall be entitled "In the High Court of Australia," "On appeal from" the Court from which the appeal is brought, naming it; and shall also be entitled as between the party appellant and the party respondent.

Title of appeals.

7. The appellant shall, within the time prescribed for serving the notice of appeal, file a copy of the notice of appeal in the Court from which the appeal is brought.

Notice to Registrar.
Ct., Q. Or. 70,
r. 5.

The fee payable on filing a copy of notice or motion instituting an appeal is 5s.; Rules of Court, 6th October, 1903.

Appeal by leave.

8. When the appeal is brought by leave of the High Court, the notice of appeal shall state that it is so brought. A copy of the order giving leave to appeal shall be served with the notice of appeal, and a copy shall also be filed with the notice in the Court from which the appeal is brought.

Giving of
unauthorized
appeals.

9. When notice of appeal is given without the leave of the High Court in a case in which an appeal cannot be brought as of right, the Court from which the appeal is proposed to be brought, or a Judge thereof, may set aside the notice.

Security for
costs of appeal.

10. Within three months after the service of notice of appeal, or such other time as is prescribed by an order giving leave to appeal, the appellant shall give the prescribed security for the costs of the appeal.

Such security shall be given in the Court from which the appeal is brought.

If the security is not given within the prescribed time, the appeal shall be deemed to be abandoned.

As soon as it is given, the appeal shall be deemed to be duly instituted.

As to security, see H.C.P. Act, sec. 35.

Applications for increase of amount of security under Or. 36 of *High Court Procedure Act* must (following the English practice) be made with expedition, whether there is a Justice of the High Court sitting in the State where the appeal is to be heard or not.

On Dec. 29th, 1903, the plaintiff filed notice of intention to appeal to the High Court from a decision of the Supreme Court of New South Wales, and deposited £50 as security for the due prosecution of the appeal, in accordance with sec. 35, sub-secs. (1) and (3) of the *High Court Procedure Act*. On Feb. 4th the defendant had notice of the plaintiff's appeal, and in March took out a summons for increased security in each case, under sec. 36 of the Act. There was no Justice of the High Court sitting in Sydney until March 14th, but in the interval the High Court had been sitting in Hobart and Melbourne.

Held (per Griffith, C.J.) that the applications were made too late, and that the applicants should have proceeded under sec. 8 by taking out a summons in Sydney and having it heard and disposed of as early as possible by a Justice sitting in Hobart or Melbourne; *McLaughlin v. Daily Telegraph Newspaper Co.*, 1 C.L.R., 143.

Forms of
Security.

10B. Security may be given either by payment of money into Court or by bond with securities to the satisfaction of the Prothonotary, Master, Registrar, or other proper officer of the Supreme Court.

This rule was added by Rules of Court, 12th October, 1903.

* 11. If the security is given within the prescribed time, the proper officer of the Court from which the appeal is brought shall forthwith transmit to the Registrar of the Registry of the High Court to which the proceedings would have been transmitted if the cause or matter were a cause removable into the High Court, and had been so removed, a certified copy of all such documents as are required for the hearing of the appeal; and that Registrar, if he is not the Principal Registrar, shall transmit them to the Principal Registrar. Transmission of documents.

A statement of the reasons of the Court for the decision shall be included in the documents so transmitted.

*This rule was repealed by Rules of Court, Oct. 12th, 1903, and the following rule was substituted therefor :—

11. If the security is given within the prescribed time, the proper officer of the Court from which the appeal is brought shall forthwith transmit to the Registrar of the Registry of the High Court at the seat of Government of the State a certified copy of all such documents as are required for the hearing of the appeal; and, if the appeal is directed to be heard elsewhere than in the State, the Registrar shall transmit them to the Registrar of the Registry situated in the place where the appeal is to be heard. Transmission of documents.

A statement of the reasons of the Court for the decision shall, if practicable, be included in the documents so transmitted.

After the appeal has been disposed of they shall, if they have been received from another Registry, be returned to the Registry from which they were so received.

* 12. The appeal shall be set down by the appellant for hearing at the first sitting of the High Court for hearing appeals appointed to be held after the expiration of two months from the due institution of the appeal, unless the respondent consents to its being set down for an earlier sitting. Setting down appeal for hearing.

If it is not so set down, any respondent may apply to the High Court upon motion for an order dismissing the appeal for want of prosecution.

*This rule was repealed, Oct. 12th, 1903, and the following was substituted therefor :—

12. The appeal shall be set down for hearing at a sitting of the High Court appointed for hearing appeals at the place at which it is to be heard. It shall be set down for the first such sitting appointed to be held after the expiration of two months from the due institution of the appeal, unless the respondent consents to its being heard at an earlier sitting. Setting down appeal for hearing.

If the appellant does not set down the appeal for hearing at that sitting, and, three weeks at least before the day appointed for holding the sitting, give notice to the respondent that he has done so, unless the respondent consents to take shorter notice, the respondent,

or any respondent if more than one, may apply to a Full Court, at any place at which it may be sitting, by motion upon notice for an order dismissing the appeal for want of prosecution.

The fee payable on setting down an appeal from a judgment of the Supreme Court of a State is £2; Rule of Court, 6th October, 1903.

Cross appeals.
Cf., E. Or. 58,
r. 6.

13. It shall not be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends upon the hearing of an appeal to contend that the decision appealed from should be varied, he shall within the time prescribed by the next following rule, or such time as is allowed by special order of a Full Court in any case, give notice of his intention to such of the parties as may be affected by the contention. The omission to give such notice shall not diminish the powers of the High Court when hearing the appeal; but may, in the discretion of the Court, be ground for an adjournment of the appeal or for a special order as to costs.

Time.
Cf., E. Or. 58,
r. 7.

14. Subject to any special order made in any case, notice by a respondent under the last preceding rule shall be given one month before the day for which the appeal is set down for hearing.

Month means calendar month; see *Acts Interpretation Act 1901*, sec. 22

Papers for
Justices.
Cf., E. Or. 58,
r. 11.

15. Ten days at least before the day for which the appeal is set down for hearing, the appellant shall leave at the Chambers of each of the Justices who are to sit on the hearing of the appeal, a copy of the documents transmitted to the Principal Registrar.

Evidence on
appeals.
Cf., E. Or. 58,
r. 12.

16. When the evidence has not been printed in the Court below, the High Court or a Justice may order the whole or any part thereof to be printed for the purposes of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court otherwise orders.

Interlocutory
judgment and
orders not
appealed from
not to bar relief.
Cf., E. Or. 58,
r. 14.

17. An interlocutory judgment or order from which there has been no appeal shall not operate to prevent the Court, upon hearing an appeal, from giving such decision upon the appeal as is just.

As to what constitutes an interlocutory order, see p. 145.

Notes of ruling
or direction.
Cf., E. Or. 58,
r. 13.

18. If, upon the hearing of an appeal, a question arises as to the ruling or direction of a judge to a jury, the Court shall have regard to the verified notes or other evidence, and to such other materials as the Court deems expedient.

See note to and sec. I., r. 24, *supra*.

19. When an appeal has been duly instituted, the execution of the judgment appealed from shall be stayed until the party desiring to prosecute it has given sufficient security, to the satisfaction of the Court from which the appeal is brought, to abide the decision of the High Court upon the hearing of the appeal.

As to stay of proceedings, see H.C.P. Act, sec. 38.

APPENDIX.

FORMS OF PROCEEDINGS.

No. 1.—General Form of Writ of Summons.

In the High Court of Australia.

Between A.B. [an infant, by G.H., his next friend], plaintiff,
and
C.D. and E.F., Defendants.

EDWARD THE SEVENTH, by the grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith:

To C.D. of and E.F. of :

WE command you that within days after the service of this writ on you inclusive of the day of such service, you do cause an appearance to be entered for you in Our High Court of Australia, in an action at the suit of A.B. ; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness: Y.Z., Chief Justice of Our said High Court, at (*Principal Seat of the Court*) the day of in the year of Our Lord One thousand nine hundred and [L.S.]

Memorandum to be subscribed on the writ.

N.B.—This writ is to be served within twelve calendar months from the date thereof, or, if renewed within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

Appearance [or Appearances] to this writ may be entered by the defendant [or defendants] either personally or by solicitor at the Principal [or District] Registry of the High Court at (*Registry from which writ is issued*).

Additional memorandum to be subscribed on writs issued from District Registries.

If any defendant neither resides nor carries on business in the State of (*State in which District Registry is situated*), his appearance may, at his option, be entered either at the place above mentioned or at the Principal Registry of the High Court at (*Principal Seat of the Court*).

Indorsements to be made on the writ before issue.

The plaintiff's claim is, &c. (*state briefly the nature of the relief claimed in the action.*)

This writ was issued by the plaintiff in person, who resides at _____, and whose address for service is at the same place [or at _____] [or This writ was issued by X.Y., of _____, whose address for service is at _____, solicitor for the plaintiff, who resides at _____, or This writ was issued by V.W., of _____, whose address for service is _____, agent for X.Y. of _____, solicitor for the plaintiff, who resides at _____] (*mention the locality and situation of the plaintiff's residence in such a manner as to enable it to be easily discovered.*)

Indorsement to be made on the writ after service thereof.

This writ was served by me on the defendant _____ at _____ on _____ day, the _____ day of _____, 19 ____.

Indorsed the _____ day of _____, 19 ____.

(Signed) M.N.

(Address)

No. 2—Writ of Summons in actions in rem.

In the High Court of Australia.

A.B., Plaintiff,
against

The Ship X

[or the Ship X and freight

or the Ship X, her cargo and freight

or (if the action is against cargo only) The cargo ex the Ship (*state the name of ship on board of which the cargo is or lately was laden*)

or (if the action is against the proceeds realized by the sale of a Ship or cargo) The proceeds of the Ship X (or of the cargo ex the Ship X).

or Fifty cases of Opium (*or as the case may be*).

EDWARD THE SEVENTH, by the grace of God, &c.

To the Owners and all others interested in the Ship X, her cargo and freight (*or as the case may be, describing the subject-matter of the action*):

WE command you, &c. (*as in Form No. 1*).

(*Memoranda and indorsements as in Form No. 1.*)

Note.—If the action is by the Crown, instead of the plaintiff's name put "Our Sovereign Lord the King," adding, if necessary, "in His Office of Admiralty."

No. 3.—Writ of Service beyond the Jurisdiction, or when Notice in lieu of Service is to be given beyond the Jurisdiction.

[*Title, &c., as in Form No. 1.*]

EDWARD, &c.

To C.D., of _____ :

WE command you that within _____ days after the service of this writ [or notice of this writ [*as the case may be*]] on you, inclusive of the day of such service, you do cause an appearance to be entered for you in Our High Court of Australia, in an action at the suit of A.B.; and take notice, that in default of your so doing the plaintiff may, by leave of the Court or a Justice, proceed therein, and judgment may be given in your absence. Witness, &c.

(*Memoranda and indorsements as in Form No. 1.*)

Further indorsement to be made on the writ before the issue thereof, or re amendment to include a defendant to be served beyond the Commonwealth:—

N.B.—This writ is to be used where the defendant or all the defendants, or one or more defendant or defendants, is or are to be served beyond the Commonwealth of Australia. When the defendant to be served is not a British subject, and is not in British dominions, notice of the writ, and not the writ itself, is to be served upon him.

No. 4.—*Notice to be served beyond the Jurisdiction in lieu of Writ.*
the High Court of Australia.

Between A.B.,
C.D. and E.F.,

Plaintiff.
and
Defendants.

To E.F., of

Take notice that A.B., of , has commenced an action against you, F., in the High Court of Australia, by writ of that Court dated the 1 of A.D. 19 , which writ is indorsed as follows [*copy in full the indorsements*]: and you are required within days after the receipt of a notice, inclusive of the day of such receipt, to defend the said action by making an appearance to be entered for you in the said Court to the said action; and in default of your so doing the said A.B. may, by leave of the Court or a justice, proceed therein, and judgment may be given in your absence.

You may appear to the said writ by entering an appearance personally or your solicitor at the Principal Registry of the Court at (*Principal Seat of the Court*) [or, your option, (*if the writ is issued from a District Registry*) at the District Registry of the Court at (*place of District Registry from which writ is issued*)].

(Signed) A.B., of &c.
X.Y., of or &c.
Solicitor for A.B.

No. 5.—*Special Notice under Order XIII.*

(*To be added after indorsement of claim on writ.*)

The defendant is required to take notice that, if he appears, the plaintiff intends to proceed to trial without pleadings.

No. 6.—*General Form of Entry of Appearance by Defendant.*
the High Court of Australia.

(*Title as in writ of summons, adding after the name of any defendant who is infant, "by G.H., his guardian ad litem."*)

Enter an appearance in this action for the defendant C.D.

[The said defendant requires (or does not require) a statement of claim to be delivered.]

Dated, &c.

C.D., defendant in person
[or Y.Z., Solicitor for the Defendant C.D.]

The address of C.D. is .

His address for service is .

[or The place of business of Y.Z. is .

His address for service is .]

*No. 7.—Entry of Conditional Appearance.**(Title, &c., as in Form No. 1.)*

Enter a conditional appearance in this action for the defendant C.D., who denies the jurisdiction of the Court to entertain the action against him without his consent [or denies that he is a partner in the defendant firm].

Dated, &c.

(Signature and memoranda as in Form No. 1, omitting reference to statement of claim.)

*No. 8.—Affidavit for Entry of Appearance as Guardian.**(Title, &c., as in writ of summons or originating proceeding.)*

I, Y.Z., of _____, solicitor, make oath and say as follows:—

G.H. of *(state residence and description)*, is a fit and proper person to act as guardian *ad litem* of the above-named infant defendant, and has no interest in the matters in question in this cause adverse to that of the said infant, and the consent of the said G.H. to act as such guardian is hereto annexed marked with the letter A.

Signed and sworn, &c.

Note.—To this affidavit must be annexed the document signed by the guardian in testimony of his consent to act, which may be in the following form:—

I, G.H., of *(state residence and description)*, consent to act as guardian *ad litem* of C.D., an infant defendant in this cause, and I authorize Mr. Y.Z., of &c. solicitor, to defend this cause as solicitor for me as such guardian.

G.H.

Witness X.Y.

*No. 9.—General Form of Notice of Appearance by Defendant.**(Title, &c., as in writ of Summons.)*

Take notice that I have this day entered an appearance in this action at the Principal [or District] Registry of the High Court of Australia at _____ [for the defendant C.D.]

I require [or do not require] [or The said defendant requires (or does not require)] a statement of claim to be delivered.

C.D., defendant in person

[or Y.Z., Solicitor for the Defendant C.D.]

The address of C.D. is _____

His address for service is _____

[or The place of business of Y.Z. is _____

His address for service is _____.]

In the case of a conditional appearance insert the word “conditional” before “appearance.”

HIGH COURT OF AUSTRALIA.

RULE OF COURT.

As of Tuesday, the sixth day of October, A.D. 1903.

It is ordered as follows :—

The Fees and Percentages to be taken in the several Offices of the High Court of Australia by the several officers thereof shall be as set forth in the following Schedule, that is to say :—

THE SCHEDULE.

SCALE OF FEES.

I.— TO BE TAKEN IN THE REGISTRIES.

Summonses, Writs, and Commissions. £ s. d.

On sealing a writ of summons for commencement of an action	0	10	0
On sealing a concurrent writ of summons for commencement of an action	0	2	6
On sealing a writ of subpœna for not more than three persons	0	5	0
For every additional person named in the subpœna	0	1	0
On sealing any writ of execution	0	5	0
On sealing writ of mandamus, certiorari, habeas corpus, or prohibition	1	0	0
On sealing writ of assistance	0	10	0
On sealing writ of inquiry	0	10	0
On sealing any other writ	0	5	0
On sealing a renewed or amended writ of summons	0	5	0
On sealing any originating summons	0	5	0
On sealing summons for directions under Order XII.	0	5	0
On sealing any other summons	0	3	0
On sealing any commission issued by authority of the Court or a Justice whether under the authority of a Statute or of Rules of Court	1	0	0
On sealing any document issued from the Court for use beyond the jurisdiction of the Court, not being a writ or other document for service on a party to a cause or matter	0	10	0

COSTS.

	£	s.
On sealing any other document with the seal of the Court .	0	10

The above fees include the filing of all copies or præcipes or other documents required to be filed on the sealing or issuing of the above documents.

Appearances.

On entering an appearance, for each person	0	2
If by a corporation or joint stock company or a company incorporated by Statute or Royal Charter	0	10

Copies.

For an office copy of any record of the Court, or of any document filed in the Registry, if in the English language for every folio	0	0
If in a foreign language, the actual cost of making and examining same, and in addition for marking and sealing same as an office copy	0	2
For an office copy of a plan, map, section, drawing, photograph, or diagram, the actual cost of making and examining same, and in addition for marking and sealing same as an office copy	0	2

Attendances.

On an application, with or without a subpoena, for any officer not being the Associate of the Justice presiding at the Court, to attend with any record or document at any Court or place out of the Court building, in addition to the just charges and expenses of the officer for each day or part of a day he shall necessarily be absent from his office	1	0
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The officer may require a deposit on account of any further fees, charges, or expenses which may probably become payable beyond the amount paid for fees, charges, and expenses on the application, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof on the application.

The officer may also require an undertaking in writing to pay any further fees, charges, and expenses which may become payable beyond the amounts so paid and deposited.

Securities.

On making appointment to inquire into sufficiency of sureties	0	1
On attesting execution of instrument of security under Order		

XXV, whether by one or more sureties, and whether entered into by all at one time or not	£	s.	d.
On inquiring as to sureties under Order XXV, and indorsing approval on instrument of security	0	10	0
On vacating a recognisance	0	10	0
<i>Filing.</i>			
On filing a special case	1	0	0
On filing special case, being an appeal from an inferior Court	0	10	0
On filing an instrument of security under Order XXV	0	5	0
On filing a copy of a notice of motion originating a cause or matter	0	10	0
On filing a petition originating a cause or matter, including the sealing of the indorsement of time appointed for hearing on all copies of the petition intended for service	0	10	0
On filing any other petition	0	5	0
On filing any pleading or other document required to be delivered, when no appearance entered	0	2	6
On filing a notice of change of solicitor	0	2	6
On filing, unless otherwise provided, an affidavit, deposition or set of depositions, including any annexures to any such affidavit or deposition	0	2	6
On filing exhibits referred to in an affidavit or deposition and not annexed thereto, and required to be filed, for each exhibit	0	1	0
But not to exceed	0	5	0
On filing a writ of execution with return	0	2	6
On filing a preliminary Act in actions for damage by collision	0	5	0
On depositing in any cause or matter any documents ordered to be deposited for safe custody or to be impounded, for each document	0	1	0
On a receipt for any document or documents to which the last fee applies when delivered out	0	1	0
On filing a notice of discontinuance of an action or withdrawal of part of a cause of action by a plaintiff or a counter-claiming defendant	0	2	6
On filing a consent in writing signed by the parties withdrawing a cause which has been entered for trial	0	2	6
On filing a copy of the pleadings and issues or such other proceedings as show the questions for trial by the party entering the trial	0	2	6
On filing a written request to set down a cause or matter for further consideration	0	5	0

COSTS.

On filing a written authority to use a person's name as next friend	£	s.	d.
	0	2	6
On filing a disclaimer of office by defendant under Order XLI	0	5	0
On filing notice under Queensland Justices Act	0	5	0
On filing a bill of costs for taxation	0	2	6
On filing a certificate of an examiner of refusal of a witness to attend or to be sworn	0	2	6
On an examiner filing a question to which a witness objects, together with the objection	0	2	6
On filing a copy of notice of motion instituting an appeal	0	5	0
On filing any document in respect of which no other fee is provided	0	1	0

Payment into Court.

On payment of money into Court	0	5	0
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Certificates.

For a certificate of an associate of the result of trial	1	0	0
For a certificate of taxing officer of result of taxation of bill of costs	0	2	6
For a certificate of the Registrar of the result of any proceeding before him	0	5	0

Searches.

On a search for appearance	0	1	0
Unless otherwise expressly provided by any Act of Parliament, Rules of Court, or this Schedule, on a search in any register kept in the Registry, or on searching an index or calendar to the files or bundles of documents filed, and inspecting the documents, for every hour or part of an hour occupied	0	2	6
Not to exceed per day	0	10	0
Provided that if a search is made in more than one register an additional search fee shall be charged for every register beyond the first.			
Inspecting any documents deposited pursuant to an order for safe custody or impounded	0	2	6

Examination of Witnesses.

On obtaining appointment for examination of a witness before an officer of the Court	0	5	0
In respect of every witness sworn and examined by an officer of the Court in his office, unless otherwise provided, including oath, for each hour or part of an hour	0	10	0

For an examination of witnesses by any such officer away from the office, in addition to reasonable travelling and other expenses, per day or part of a day	£	s.	d.
	3	0	0

The officer may require a deposit on account of fees and expenses which may probably become payable beyond any amount paid for fees and expenses upon the examination; and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof and deliver the same to the party making the deposit.

The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amount so paid and deposited.

On examination of witnesses by persons other than officers of the Court (these fees to be retained by examiner for his own use).

Upon giving an appointment to take an examination	0	5	0
Or, if evidence taken on commission, for giving such appointment, to each commissioner who acts at the examination	0	5	0
If the time occupied in an examination is less than three hours	3	0	0
If the time occupied in an examination is more than three hours, for each day or part of a day	5	0	0

When evidence is taken on commission, the two preceding fees shall be paid to each commissioner who acts at the examination.

On a request to examine witnesses abroad, such fee shall be payable to the examiner as is prescribed by the laws of the country where the examination is to take place, and shall be paid to the Registrar to be transmitted with the request.

The term "officer of the Court" does not include an Associate.

Hearing.

On setting down an appeal to the Full Court from a judgment of the Supreme Court of a State or of a Judge of the Supreme Court of a State	2	0	0
If from an order made in Chambers	1	0	0
On setting down an appeal from an inferior Court to the Full Court, whether by special case or otherwise	1	0	0
On entering a special case or demurrer for argument, either before a single Judge or before the Full Court, in the first instance, including in the latter case, when necessary, the			

filing of the memorandum requiring same to be entered	£	s.	d.
before the Full Court	1	0	0
On filing like memorandum of another party	0	5	0
On entering an action for trial before a Justice, with or without a jury in addition to the fees, if any, payable in respect of the jury	1	0	0
On entering an election petition for trial	1	0	0
On hearing an action on motion for judgment	0	10	0
On hearing any cause or matter set down for further considera- tion	0	10	0
On hearing any cause or matter commenced by motion on notice or by petition, except when otherwise provided	1	0	0
On hearing any other petition in Court	0	5	0
On setting down an appeal from Justices	0	10	0

Drawing up and entering Judgments and Orders.

If made in Court on the original hearing or hearing on further consideration of a cause, or on the hearing of a special case or petition, or on application to the Full Court, unless otherwise provided	1	0	0
If a judgment without hearing, or by consent	0	10	0
If a judgment under Order XXIII, Rule 7 or Rule 8, or Order XXVII, Rule 3, or Order XXVIII, Rule 2	0	10	0
Any other order whether made in Court or at Chambers	0	5	0

The above fees include filing the duplicate original.

Taxation of Costs.

For taxing a bill of costs when the amount allowed does not exceed £10	0	2	0
When the amount exceeds £10, for every £5 allowed or a fraction thereof	0	0	0

These fees, except where otherwise provided, shall be taken on signing the certificate or on the allowance of the bill of costs as taxed, but the fees shall be due and payable, if no certificate or allocatur is required, on the amount of the bill as taxed, or on the amount of such part thereof as may be taxed, and the solicitor, or party suing in person, shall in such case pay the proper sum, the amount whereof shall be fixed by the taxing officer.

The taxing officer may require a deposit on account of fees before taxation, not exceeding the fees on the full amount of the costs as submitted for taxation, and the

officer on taking such deposit shall make a memorandum £ s. d.
thereof on the bill of costs.

Miscellaneous.

On a fiat of a Justice	0	5	0
On a party attending before a Judge signifying his consent to a consent order being drawn, to enter judgment against him	0	5	0
On entering a satisfaction of judgment	0	5	0

II.—TO BE TAKEN IN THE MARSHAL'S OFFICES.

The same fees are to be taken as by the practice of the Supreme Court of the State in which the proceeding is taken or the act is done or authorized and required to be taken by the Sheriff in respect of a like proceeding or act in a cause pending in that Court.

A deposit on account of the fees applicable to any proceeding or act may be required before such proceeding is commenced or act done, or at any time during the course thereof, and a memorandum of the amount deposited shall be delivered to the party making the deposit.

In case of dispute as to any of the charges the amount is to be taxed by the taxing officer without fees.

(L.S.) S. W. GRIFFITH, C.J.
EDMUND BARTON, J.
R. E. O'CONNOR, J.

GORDON H. CASTLE, Principal Registrar.

HIGH COURT OF AUSTRALIA.

RULES OF COURT.

As of Monday the twelfth day of October A.D. 1903. It is ordered as follows :—

1. The following Rule shall stand as part of Order IX. of the RULES OF COURT (Original Jurisdiction) in the Schedule to the *High Court Procedure Act 1903* :—

Appearance at Principal Registry to be notified by telegraph to District Registry in certain cases.

8A. If a defendant, being entitled to enter his appearance either at a District Registry or at the principal Registry, elects to enter it at the Principal Registry, the Principal Registrar shall on the same day, at the cost of the defendant, notify to the District Registrar by telegraph that the appearance has been entered.

2. The APPEAL RULES in the Schedule to the said Act shall be amended as follows :—

(1) The following Rule shall stand as part of Section 1 of the said Appeal Rules :—

Place for hearing appeals.

1A. Unless otherwise directed by the Court or a Justice, appeals shall be heard at the seat of government of the State in a Registry whereof the cause is pending. The Court or a Justice may direct that any appeal shall be heard at the seat of government of some other State.

(2) In Rule 6 of the said Section 1 the words “within four days if the application was made at the Principal Seat of the Court and in any other case” shall be omitted.

(3) Rule 13 of the said Section I. shall be repealed, and the following Rule shall be substituted for it :—

Transmission of documents.

13. When the appeal is directed to be heard at a place other than that in which the Registry in which the cause is pending is situated the Registrar of the last-mentioned Registry shall transmit to the Registrar of the Registry situated at the place at which the appeal is to be heard all such documents as may be

necessary for the hearing of the appeal. After the appeal has been disposed of, they shall be returned to the Registry in which the cause is pending.

(4) the following Rule shall stand as part of Section II. of the said Appeal Rules :—

1A. Unless otherwise directed by the Court or a Justice such appeals and applications shall be heard at the seat of government of the State. The Court or a Justice may direct that any such appeal or application shall be heard at the seat of government of some other State. Place for hearing appeals.

(5) Rules 2 and 3 of the said Section II. shall be repealed, and the following Rules shall be substituted for them :—

2. A copy of the notice of appeal, or notice of motion for a new trial, or to set aside the verdict, finding, or judgment, shall be filed in the Supreme Court, and a copy shall also be filed in the Registry of the High Court situated at the seat of government of the State ; and the appeal shall not be deemed to be duly instituted until these copies have been filed. Notice of appeal to be filed in Supreme and High Court.

3. The proper officer of the Supreme Court shall deliver to the Registrar of the last-mentioned Registry of the High Court such documents as are necessary for the hearing of the appeal ; and that Registrar, if the appeal is not to be heard in the State, shall transmit them to the Registrar of the Registry of the High Court situated at the place where the appeal is to be heard. Delivery and transmission of documents.

After the appeal or motion has been disposed of, the documents shall be returned to the proper officer of the Supreme Court by or through the Registrar of the Registry in the State, as the case may be.

(6) The following Rules shall stand as part of Section IV. of the said Appeal Rules :—

1A. Unless otherwise directed by the Court or a Justice appeals shall be heard at the the seat of government of the State from a Court whereof the appeal is brought. The Court or a Justice may direct that any appeal shall be heard at the seat of government of some other State. Place for hearing appeals.

10B. Security may be given either by payment of money into Court or by bond with sureties to the satisfaction of the Prothonotary, Master, Registrar, or other proper officer of the Supreme Court. Form of security.

(7) Rule 11 of the said Section IV. shall be repealed, and the following Rule shall be substituted for it :—

Transmission of documents.

11. If the security is given within the prescribed time, the proper officer of the Court from which the appeal is brought shall forthwith transmit to the Registrar of the Registry of the High Court at the seat of government of the State a certified copy of all such documents as are required for the hearing of the appeal ; and, if the appeal is directed to be heard elsewhere than in the State, the Registrar shall transmit them to the Registrar of the Registry situated in the place where the appeal is to be heard.

A statement of the reasons of the Court for the decision shall, if practicable, be included in the documents so transmitted.

After the appeal has been disposed of they shall, if they have been received from another Registry, be returned to the Registry from which they were so received.

Setting down appeal for hearing.

(8) Rule 12 of the said Section IV. shall be repealed, and the following Rule shall be substituted for it :—

12. The appeal shall be set down for hearing at a sitting of the High Court appointed for hearing appeals at the place at which it is to be heard. It shall be set down for the first such sitting appointed to be held after the expiration of two months from the due institution of the appeal, unless the respondent consents to its being heard at an earlier sitting.

If the appellant does not set down the appeal for hearing at that sitting, and, three weeks at least before the day appointed for holding the sitting, give notice to the respondent that he has done so, unless the respondent consents to take shorter notice, the respondent, or any respondent if more than one, may apply to a Full Court, at any place at which it may be sitting, by motion upon notice for an order dismissing the appeal for want of prosecution.

Amount of costs.

3. The fees payable to barristers and solicitors in respect of business transacted by them in the High Court or the offices thereof shall, unless otherwise ordered, be taxed, allowed, and certified by the Registrar or a Deputy Registrar or some other officer duly appointed for the purpose, and shall be allowed in accordance, as nearly as may be, with the scale of costs applicable, under the practice of the Supreme Court of the State in which the business is transacted, to business of an analogous nature transacted in that Supreme Court or the offices thereof.

4. Every taxation of costs shall be subject to review by a Justice. Review of taxation.

5. Registrars and Commissioners for Affidavits shall be entitled to receive and retain for their own use fees at the rates following, that is to say:—

	£	s	d.
For each oath or affirmation	0	1	6
If not at Registry or Commissioner's office	0	5	0
Or, if above 1 mile from Registry or Commissioners office, over and above travelling expenses	1	1	0
For marking each sheet of an affidavit or affirmation or of an annexure	0	1	0
For signing each certificate to an exhibit	0	1	0
For attesting instrument of security, for each surety	0	5	0

S. W. GRIFFITH, C.J.
EDMUND BARTON, J.
R. E. O'CONNOR, J.

(L S.)

GORDON H. CASTLE, Principal Registrar.

THE COURT OF DISPUTED RETURNS.

[COMMONWEALTH ELECTORAL ACT 1902.]

PART XVI.—COURT OF DISPUTED RETURNS.

Method of disputing elections.

192. The validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise.

The Court of Disputed Returns.

193. (1) The High Court shall be the Court of Disputed Returns, and shall have jurisdiction either to try the petition or to refer it for trial to the Supreme Court of the State in which the election was held or return made.

(2) When a petition has been so referred for trial to the Supreme Court of a State, that Court shall have jurisdiction to try the petition, and shall in respect of the petition be and have all the powers and functions of the Court of Disputed Returns.

(3) Until the establishment of the High Court, the Supreme Court of each State shall be the Court of Disputed Returns in respect of elections held or returns made in that State; and the provisions of this Act with respect to the filing of petitions, the deposit of security, and the duties of the Registrar, shall be read as if the Supreme Court of the State, or the offices or Registrar, Master, or Prothonotary thereof, were substituted therein for the High Court or a Registry or Registrar thereof respectively.

(4) The jurisdiction of the High Court or of the Supreme Court of a State sitting as a Court of Disputed Returns, or in the exercise of powers conferred by this section, may be exercised by a single Justice or Judge.

Requisites of petition.

194. Every petition disputing an election or return in this part of this Act called the petition shall—

(a) Set out the facts relied on to invalidate the election or return :

- (b) Contain a prayer asking for the relief the petitioner claims to be entitled to :
- (c) Be signed by a candidate at the election in dispute or by a person who was qualified to vote thereat :
- (d) Be attested by two witnesses whose occupations and addresses are stated :
- (e) Be filed in the Principal Registry of the High Court or in the District Registry of that Court in the capital city of the State in which the election was held within forty days after the return of the writ.

FACTS RELIED ON.—Only such facts as are within the jurisdiction of the Court to deal with should be stated in the petition. Irrelevant matters and the allegation of illegal practices or irregularities outside the jurisdiction of the Court may be struck out on summons in Chambers. In the Denison Election Petition, *Cameron v. Fysh*, (April 18, 1904), 1 C.L.R.

195. At the time of filing the petition the petitioner shall deposit with the Principal Registrar or District Registrar (as the case may be) of the High Court the sum of Fifty pounds as security for costs. Deposit as security for costs.

196. No proceedings shall be had on the petition unless the requirements of the preceding sections are complied with. No proceedings unless requisites complied with.

197. The Court of Disputed Returns shall sit as an open Court and its powers shall include the following :— Powers of Court

- (i.) To Adjourn :
- (ii.) To compel the attendance of witnesses and the production of documents :
- (iii.) To examine witnesses on oath :
- (iv.) To declare that any person who was returned as elected was not duly elected :
- (v.) To declare any candidate duly elected who was not returned as elected :
- (vi.) To declare any election absolutely void :
- (vii.) To dismiss or uphold the petition in whole or in part :
- (viii.) To award costs.
- (ix.) To punish any contempt of its authority by fine or imprisonment.

VOID.—In the Melbourne Election Petition, *Maloney v. McEacharn*, 1 C.L.R., 77, the sitting member's majority was lost through the rejection of a number of informal postal votes which were in his favor. These votes were lost

through informalities arising from erroneous instructions issued by an electoral officer in the employment of the Commonwealth. *Held, per Griffith, C.J.*:—If a number of electors lost the franchise through the mistake of the officer, it is a ground for voiding the election. If an elector lost his vote by his own error, it was his misfortune and that of the candidate for whom he intended to vote. So held also in the Riverina Election Petition, *Chanter v. Blackwood*, 1 C.L.R., 122.

In the Riverina Election Petition the Full Court held that the Court of Disputed Returns had no jurisdiction under the Statute to avoid an election on the ground that one of the candidates had by himself or agent been guilty of an illegal practice unless there was reasonable ground for believing that the result of the election may have been affected by such illegal practice; *Chanter v. Blackwood*, 1 C.L.R., 39.

COSTS.—In the Riverina Election Petition, *Chanter v. Blackwood*, 1 C.L.R., 121, the petitioner, being successful, applied for costs on the higher scale. Griffiths, C.J., said:—Claiming a seat in the Federal Parliament involves a question of as great importance as could possibly be raised. As to the matter of difficulty, the trouble had to a great extent arisen from the framing of the Act and from the action of the officers of the Federal Government in arranging for the election. It would be hard to make the respondent pay any more by reason of those mistakes. Under these circumstances he made an order for the taxation of petitioner's costs according to the ordinary Supreme Court scale for the issues upon which he had succeeded in upsetting the election.

Inquiries by Court.

W.A. 1899 No. 20, s. 148.

S.A. 1896 No. 667, s. 184.

198. The Court shall inquire whether or not the petition is duly signed, and so far as Rolls and voting are concerned may inquire into the identity of persons and whether their votes were improperly admitted or rejected, assuming the Roll to be correct; but the Court shall not inquire into the correctness of any Roll.

Real Justice to be observed.

W.A. 1899, No. 20, s. 149.

199. The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not.

See as to this section, *In re Cambooya Election Petition*, 9 Q.L.J., 341; *Chanter v. Blackwood*, 1 C.L.R., 39.

Immaterial errors not to vitiate election.

W.A. ib. s. 150.
S.A. 1896, No. 667, s. 186.

200. No election shall be avoided on account of any delay in the declaration of nominations, the polling, or the return of the writ, or on account of the absence or error of any officer which shall not be proved to have affected the result of the election.

Decisions to be final.

W.A. ib. s. 151.

201. All decisions of the Court shall be final and conclusive without appeal, and shall not be questioned in any way.

The opinion of the Full Court may, however, be obtained by a reference to the Full Court of the High Court; see *Chanter v. Blackwood*, 1 C.L.R., 39; *Maloney v. McEacharn*, ib., 77; *Hirsch v. Phillips*, ib., 132.

202. The Principal Registrar or District Registrar of the High Court shall forthwith after the filing of the petition forward to the Clerk of the House of the Parliament affected by the petition a copy of the petition, and after the trial of the petition shall forthwith forward to such Clerk a copy of the order of the Court.

Copies of petition minutes of proceedings and order of Court to be sent to House affected.

203. If costs are awarded to any party against the petitioner, the deposit shall be applicable in payment of the sum ordered, but otherwise the deposit shall be repaid to the petitioner.

Deposit applicable for costs.
W.A. ib. s. 154.
S.A. ib. s. 190.

204. All other costs awarded by the Court, including any balance above the deposit payable by the petitioner, shall be recoverable as if the order of the Court were a judgment of the High Court of Australia, and such order, certified by the Court, may be entered as a judgment of the High Court of Australia, and enforced accordingly.

Other costs.
W.A. ib. s. 155.

205. Effect shall be given to any decision of the Court as follows:—

Effect of decision.
W.A. ib. s. 156.
S.A. ib. s. 192.

- (i.) If any person returned is declared not to have been duly elected, he shall cease to be a Senator or Member of the House of Representatives ;
- (ii.) If any person not returned is declared to have been duly elected, he may take his seat accordingly ;
- (iii.) If any election is declared absolutely void a new election shall be held.

206. The Justices of the High Court or a majority of them or until the High Court is established the Governor-General may make Rules of Court not inconsistent with this Act for carrying this Part of this Act into effect and in particular for regulating the practice and procedure of the Court the forms to be used and the fees to be paid by parties.

Power to make rules of Court.

Every Rule of Court made in pursuance of this section shall be laid before the Senate and the House of Representatives within forty days next after it is made if the Parliament is then sitting, or if the Parliament is not then sitting then within forty days after the next meeting of the Parliament ; and if an Address is presented to the Governor-General by either House of the Parliament within the next subsequent forty sitting days of the House praying that any such rule may be annulled the Governor-General may thereupon annul the same ; and the rule so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which have in the meantime been taken under it.

To be laid before the Parliament.

HIGH COURT OF AUSTRALIA.

WE certify that by reason of urgency the following Rules should come into immediate operation.

S. W. GRIFFITH, C.J.

EDMUND BARTON, J.

RULES OF COURT.

As of Thursday the twenty-eighth day of January A.D. 1904. It is ordered as follows :—

Short title.

1. These Rules may be cited as "The Election Rules of 1904."

Application of
General Rules of
Court.

2. The Rules of Court contained in Part 1 of the Schedule to the *High Court Procedure Act* 1903, and all amendments thereof and additions thereto, shall, so far as the same are applicable, and are not inconsistent with these Rules, extend and apply to proceedings in the High Court in the exercise of its jurisdiction as the Court of Disputed Returns.

A petition disputing an election or return shall be deemed to be an originating proceeding within the meaning of these Rules.

Title of
Petition.

3. The petition shall be entitled in the manner prescribed in Rule 2 of Order I, and shall also be entitled "In the matter of the Election" in question, describing it as an election of members of the Senate for the State in which the election was held, or as an election of a member of the House of Representatives for the Electoral Division in question, or as the case may be.

It shall be divided into paragraphs in the same manner as a Statement of Claim.

4. The Registrar shall forthwith after the presentation of a petition Publication. publish a copy thereof in the *Commonwealth Gazette* and in the official *Gazette* of the State in which the election was held.

In the case of an election of a member of the House of Representatives he shall also forthwith publish in some newspaper circulating in the Electoral Division for which the election was held a notice setting forth the fact of the presentation of the petition, the date of presentation, the name of the petitioner, the nature of the relief claimed, and the grounds on which the election is disputed.

5. The petitioner shall within thirty days after the presentation Service of of the petition, or within such further time as a Justice may allow, Petition. cause an office copy of the petition to be served upon every person whose election or return is disputed by the petition.

Service upon a person returned as elected may be made either personally or by post by prepaid registered letter addressed to him at his address as stated in his nomination paper.

6. Any person who has been returned as a member may send Service at an to the Registrar at the Registry in the State in which the election Address for was held a writing signed by him giving an address not more than Service. one mile from the Registry at which a petition may be served upon him, and may by the same or another like writing appoint some person entitled to practice in the High Court as a solicitor to act as his agent in respect of any such petition.

When such writing has been sent to the Registrar, service of a petition upon the person by whom it was sent may be made by leaving the office copy of the petition with some person at the address specified in the writing.

7. Any person returned as a member whose election or return is Appearances. disputed by a petition may within fourteen days after service of the petition upon him, and any person who voted or had a right to vote at the election to which the petition relates may within fourteen days after the publication of the petition in the official *Gazette* of the State in which the election was held, enter an appearance to the petition. Every person so entering an appearance shall be deemed to be a party to the proceedings upon the petition.

Particulars of
votes objected
to.

8. When the petition, not being a petition merely claiming a fresh count of the votes, claims the seat for a person who has not been returned as a member, and alleges that such person had a lawful majority of votes, each of the parties shall, six days before the day appointed for the trial of the petition, deliver to the Registrar and to the opposite party at his address for service a list of the votes or classes of votes intended to be objected to, specifying the grounds of objection; and no evidence shall be offered by any party against the validity of any vote, nor upon any grounds of objection, not specified in the list so delivered by him, except by leave of the Court or a Justice upon such terms as to amendment of the list, adjournment of the trial, and payment of costs, as the Court or Justice may order.

Counter-charges.

9. When a petition claims a seat for a person who has not been elected as a member, and a party respondent desires to set up that the person for whom the seat is claimed was not duly elected, the ground of objection being some ground other than an erroneous counting of the votes, he shall within six days after entering his appearance, or within such further time as the Court or a Justice may allow, deliver to the Registrar and to the petitioner at his address for service a statement of the objections which he intends to raise. The statement shall set forth the objections in the same manner in which objections are required to be set forth in a petition.

Particulars in
general.

10. The Court or a Justice may order any party to a petition to deliver to any other party particulars, or further and better particulars, of any matter alleged by such party.

Trial.

11. The trial of the petition shall be held at a time and place to be appointed by a Justice on the application of some party to the petition. Ten days' notice of trial shall be given by the party obtaining the order to the other parties to the petition, and shall be advertised by the Registrar in some paper or papers circulating in the State or Electoral Division for which the election was held.

An order appointing the time and place of trial may be varied from time to time.

Withdrawal of
Petition.

12. A petition may be withdrawn by leave of the Court or a Justice upon such terms as the Court or Justice may think fit.

Substitution of
another
Petitioner.

Ten days' notice of the intention to apply for leave shall be given by advertisement in some newspaper or newspapers circulating in the State

or Electoral Division for which the election was held, and at the hearing of the application the Court or Justice may allow any other person who was competent to present a petition on the like grounds to be substituted for the petitioner. The proceedings upon the petition shall thereupon be continued as if the person so substituted had been the original petitioner.

13. When a sole petitioner dies before the trial of the petition, the Court or a Justice may allow some other person who was competent to present a petition on the same grounds to be substituted as petitioner. The proceedings upon the petition shall thereupon be continued as if the person so substituted had been the original petitioner.

Abatement
death of
Petitioner.

These Rules shall come into operation forthwith as Provisional Rules.

S. W. GRIFFITH, C.J.

(L.S.)

EDMUND BARTON, J.

GORDON H. CASTLE, Principal Registrar.



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